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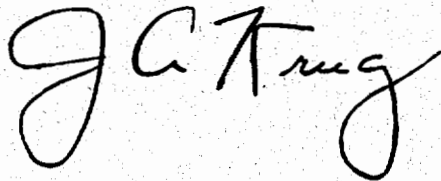
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PREFACE

This is another link in the chain of printed volumes containing the principal decisions and legal opinions rendered by officials of the Department of the Interior. The series covers material extending back to July 1881. The current volume relates to the period from July 1, 1942, to December 31, 1944.

The decisions and opinions contained in this volume were rendered during the administration of the Honorable Harold L. Ickes as Secretary of the Interior. During the period covered by the volume, Mr. Abe Fortas served as Under Secretary of the Interior; Messrs. E. K. Burlew and Michael W. Straus served successively as First Assistant Secretary of the Interior; Mr. Oscar L. Chapman served as Assistant Secretary of the Interior; Messrs. Nathan R. Margold, Warner W. Gardner, and Fowler V. Harper served successively as Solicitor of the Department of the Interior; and Messrs. Felix S. Cohen, William H. Flanery, and Leland O. Graham served as members of the Board of Appeals of the Department of the Interior.

This volume will be cited within the Department of the Interior as "58 I. D."

A handwritten signature in dark ink, appearing to read "J. A. King". The signature is written in a cursive style with a large, looping initial "J" and a long, sweeping underline.

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¹ The period covered is July 1942 to December 1944.

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ETHEL B. FOLAND

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- California, State of (22 L. D. 428); overruled, 32 L. D. 34.
- California, State of (32 L. D. 346); vacated, 50 L. D. 628. (See 37 L. D. 499, and 46 L. D. 396.)
- California, State of (44 L. D. 118); overruled, 48 L. D. 98.
- California, State of (44 L. D. 468); overruled, 48 L. D. 98.
- California, State of, v. Moccettini (19 L. D. 359); overruled, 31 L. D. 335.
- California, State of, v. Pierce (9 C. L. O. 118); modified, 2 L. D. 854.
- California, State of, v. Smith (5 L. D. 543); overruled, 18 L. D. 343.
- Call v. Swaim (3 L. D. 46); overruled, 18 L. D. 373.
- Cameron Lode (13 L. D. 369); overruled so far as in conflict, 25 L. D. 518.
- Camplan v. Northern Pacific R. R. Co. (28 L. D. 118); overruled so far as in conflict, 29 L. D. 550.
- Case v. Church (17 L. D. 578); overruled, 26 L. D. 453.
- Case v. Kupferschmidt (30 L. D. 9); overruled so far as in conflict, 47 L. D. 406.
- Castello v. Bonnie (20 L. D. 311); overruled, 22 L. D. 174.
- Cate v. Northern Pacific Ry. Co. (41 L. D. 316); overruled so far as in conflict, 43 L. D. 60.
- Cawood v. Dumas (22 L. D. 585); vacated, 25 L. D. 526.

- Centerville Mining and Milling Co. (39 L. D. 80); no longer controlling, 48 L. D. 17.
- Central Pacific R. R. Co. (29 L. D. 589); modified, 48 L. D. 58.
- Central Pacific R. R. Co. v. Orr (2 L. D. 525); overruled, 11 L. D. 445.
- Chapman v. Willamette Valley and Cascade Mountain Wagon Road Co. (13 L. D. 61); overruled, 20 L. D. 259.
- Chappell v. Clark (27 L. D. 334); modified, 27 L. D. 532.
- Chicago Placer Mining Claim (34 L. D. 9); overruled, 42 L. D. 453.
- Childress et al. v. Smith (15 L. D. 89); overruled, 26 L. D. 453.
- Chittenden, Frank O., and Interstate Oil Corporation (50 L. D. 262); overruled so far as in conflict, 53 L. D. 228.
- Christofferson, Peter (3 L. D. 329); modified, 6 L. D. 284, 624.
- Clafin v. Thompson (28 L. D. 279); overruled, 29 L. D. 693.
- Claney v. Ragland (38 L. D. 550); see 43 L. D. 486.
- Clarke, C. W. (32 L. D. 233); overruled so far as in conflict, 51 L. D. 51.
- Cline v. Urban (29 L. D. 96); overruled, 46 L. D. 492.
- Cochran v. Dwyer (9 L. D. 478); see 39 L. D. 162, 225.
- Coffin, Edgar A. (33 L. D. 245); overruled so far as in conflict, 52 L. D. 153.
- Coffin, Mary E. (34 L. D. 564); overruled so far as in conflict, 51 L. D. 51.
- Colorado, State of (7 L. D. 490); overruled, 9 L. D. 408.
- Cook, Thomas C. (10 L. D. 324); see 39 L. D. 162, 225.
- Cooke v. Villa (17 L. D. 210); vacated, 19 L. D. 442.
- Cooper, John W. (15 L. D. 285); overruled, 25 L. D. 113.
- Copper Bullion and Morning Star Lode Mining Claims (35 L. D. 27); see 39 L. D. 574.
- Copper Glance Lode (29 L. D. 542); overruled so far as in conflict, 55 L. D. 348.
- Corlis v. Northern Pacific R. R. Co. (23 L. D. 265); vacated, 26 L. D. 652.
- Cornell v. Chilton (1 L. D. 153); overruled, 6 L. D. 483.
- Cowles v. Huff (24 L. D. 81); modified, 28 L. D. 515.
- Cox, Allen H. (30 L. D. 90, 468); vacated, 31 L. D. 114.
- Crowston v. Seal (5 L. D. 213); overruled, 18 L. D. 586.
- Culligan v. State of Minnesota (34 L. D. 22); modified, 34 L. D. 151.
- Cunningham, John (32 L. D. 207); modified, 32 L. D. 456.
- Dailey Clay Products Co., The (48 L. D. 429, 431); overruled so far as in conflict, 50 L. D. 656.
- Dakota Central R. R. Co. v. Downey (8 L. D. 115); modified, 20 L. D. 131.
- Davis, Heirs of (40 L. D. 573); overruled, 46 L. D. 110.
- DeLong v. Clarke (41 L. D. 278); modified so far as in conflict, 45 L. D. 54.
- Dempsey, Charles H. (42 L. D. 215); modified, 43 L. D. 300.
- Denison and Willits (11 C. L. O. 261); overruled so far as in conflict, 26 L. D. 122.
- Deseret Irrigation Co. et al. v. Sevier River Land and Water Co. (40 L. D. 463); overruled, 51 L. D. 27.
- Devoe, Lizzie A. (5 L. D. 4); modified, 5 L. D. 429.
- Dickey, Ella I. (22 L. D. 351); overruled, 32 L. D. 331.
- Dierks, Herbert (36 L. D. 367); overruled by the unreported case of Thomas J. Guigham, March 11, 1909.
- Dixon v. Dry Gulch Irrigation Co. (45 L. D. 4); overruled, 51 L. D. 27.
- Douglas and Other Lodes (34 L. D. 556); modified, 43 L. D. 128.
- Dowman v. Moss (19 L. D. 526); overruled, 25 L. D. 82.
- Dudymott v. Kansas Pacific R. R. Co. (5 C. L. O. 69); overruled so far as in conflict, 1 L. D. 345.
- Dunphy, Elijah M. (8 L. D. 102); overruled so far as in conflict, 36 L. D. 561.

- Dyche v. Beleele* (24 L. D. 494) ; modified, 43 L. D. 56.
- Dysart, Francis J.* (23 L. D. 282) ; modified, 25 L. D. 188.
- Easton, Francis E.* (27 L. D. 600) ; overruled, 30 L. D. 355.
- East Tintic Consolidated Mining Co.* (41 L. D. 255) ; vacated, 43 L. D. 80.
- *Elliott v. Ryan* (7 L. D. 322) ; overruled, 8 L. D. 110. (See 9 L. D. 360.)
- El Paso Brick Co.* (37 L. D. 155) ; overruled so far as in conflict, 40 L. D. 199.
- Emblen v. Weed* (16 L. D. 28) ; modified, 17 L. D. 220.
- Epley v. Trick* (8 L. D. 110) ; overruled, 9 L. D. 360.
- Erhardt, Finsans* (36 L. D. 154) ; overruled, 38 L. D. 406.
- Esping v. Johnson* (37 L. D. 709) ; overruled, 41 L. D. 289.
- Ewing v. Rickard* (1 L. D. 146) ; overruled, 6 L. D. 483.
- Falconer v. Price* (19 L. D. 167) ; overruled, 24 L. D. 264.
- Fargo No. 2 Lode Claims* (37 L. D. 404) ; modified, 43 L. D. 128 ; overruled so far as in conflict, 55 L. D. 348.
- Farrill, John W.* (13 L. D. 713) ; overruled so far as in conflict, 52 L. D. 473.
- Febes, James H.* (37 L. D. 210) ; overruled, 43 L. D. 183.
- Federal Shale Oil Co.* (53 L. D. 213) ; overruled so far as in conflict, 55 L. D. 290.
- Ferrell et al. v. Hoge et al.* (18 L. D. 81) ; overruled, 25 L. D. 351.
- Fette v. Christiansen* (29 L. D. 710) ; overruled, 34 L. D. 167.
- Field, William C.* (1 L. D. 68) ; overruled so far as in conflict, 52 L. D. 473.
- Filtrol Company v. Brittan and Echart* (51 L. D. 649) ; distinguished, 55 L. D. 605.
- Fish, Mary* (10 L. D. 606) ; modified, 13 L. D. 511.
- Fisher v. Heirs of Rule* (42 L. D. 62, 64) ; vacated, 43 L. D. 217.
- Fitch v. Sioux City and Pacific R. R. Co.* (216 L. and R. 184) ; overruled, 17 L. D. 43.
- Fleming v. Bowe* (13 L. D. 78) ; overruled, 23 L. D. 175.
- Florida, State of* (17 L. D. 355) ; reversed, 19 L. D. 76.
- Florida, State of* (47 L. D. 92, 93) ; overruled so far as in conflict, 51 L. D. 291.
- Florida Mesa Ditch Co.* (14 L. D. 265) ; overruled, 27 L. D. 421.
- Florida Railway and Navigation Co. v. Miller* (3 L. D. 324) ; modified, 6 L. D. 716 ; overruled, 9 L. D. 237.
- Forgeot, Margaret* (7 L. D. 280) ; overruled, 10 L. D. 629.
- Fort Boise Hay Reservation* (6 L. D. 16) ; overruled, 27 L. D. 505.
- Freeman, Flossie* (40 L. D. 106) ; overruled, 41 L. D. 63.
- Freeman v. Texas and Pacific Ry. Co.* (2 L. D. 550) ; overruled, 7 L. D. 18.
- Fry, Silas A.* (45 L. D. 20) ; modified, 51 L. D. 581.
- Gallier, Maria* (8 C. L. O. 137) ; overruled, 1 L. D. 57.
- Gallup v. Northern Pacific Ry. Co.* (unpublished) ; overruled so far as in conflict, 47 L. D. 304.
- Gariss v. Borin* (21 L. D. 542) ; see 39 L. D. 162, 225.
- Garrett, Joshua* (7 C. L. O. 55) ; overruled, 5 L. D. 158.
- Garvey v. Tuiska* (41 L. D. 510) ; modified, 43 L. D. 229.
- Gates v. California and Oregon R. R. Co.* (5 C. L. O. 150) ; overruled, 1 L. D. 336.
- Gauger, Henry* (10 L. D. 221) ; overruled, 24 L. D. 81.
- Gleason v. Pent* (14 L. D. 375 ; 15 L. D. 286) ; vacated, 53 L. D. 447.
- Gohrman v. Ford* (8 C. L. O. 6) ; overruled so far as in conflict, 4 L. D. 580.
- Golden Chief "A" Placer Claim* (35 L. D. 557) ; modified, 37 L. D. 250.

- Goldstein *v.* Juneau Townsite (23 L. D. 417); vacated, 31 L. D. 88.
- Goodale *v.* Olney (12 L. D. 324); distinguished, 55 I. D. 580.
- Gotebo Townsite *v.* Jones (35 L. D. 18); modified, 37 L. D. 560.
- Gowdy *v.* Connell (27 L. D. 56); vacated, 28 L. D. 240.
- Gowdy *v.* Gilbert (19 L. D. 17); overruled, 26 L. D. 453.
- Gowdy et al. *v.* Kismet Gold Mining Co. (22 L. D. 624); modified, 24 L. D. 191.
- Gramplan Lode (1 L. D. 544); overruled, 25 L. D. 495.
- Gregg et al. *v.* State of Colorado (15 L. D. 151); modified, 30 L. D. 310.
- Grinnell *v.* Southern Pacific R. R. Co. (22 L. D. 438); vacated, 23 L. D. 489.
- *Ground Hog Lode *v.* Parole and Morning Star Lodes (8 L. D. 430); overruled, 34 L. D. 568. (See R. R. Rouseau, 47 L. D. 590.)
- Guidney, Alcide (8 C. L. O. 157); overruled, 40 L. D. 399.
- Gulf and Ship Island R. R. Co. (16 L. D. 236); modified, 19 L. D. 534.
- Gustafson, Olof (45 L. D. 456); modified, 46 L. D. 442.
- Halvorson, Halvor K. (39 L. D. 456); overruled, 41 L. D. 505.
- Hamilton, Hiram M. (54 I. D. 36); Instructions (51 L. D. 51), overruled so far as in conflict.
- Hansbrough, Henry C. (5 L. D. 155); overruled, 29 L. D. 59.
- Hardee, D. C. (7 L. D. 1); overruled so far as in conflict, 29 L. D. 698.
- Hardee *v.* United States (8 L. D. 391; 16 L. D. 499); overruled so far as in conflict, 29 L. D. 698.
- Hardin, James A. (10 L. D. 313); revoked, 14 L. D. 233.
- Harris, James G. (28 L. D. 90); overruled, 39 L. D. 93.
- Harrison, Luther (4 L. D. 179); overruled, 17 L. D. 216.
- Harrison, W. R. (19 L. D. 299); overruled, 33 L. D. 539.
- Hart *v.* Cox (42 L. D. 592); vacated, 260 U. S. 427. (See 49 L. D. 413.)
- Hastings and Dakota Ry. Co. *v.* Christenson et al. (22 L. D. 257); overruled, 28 L. D. 572.
- Hausman, Peter A. C. (37 L. D. 352); modified, 48 L. D. 629.
- Hayden *v.* Jamison (24 L. D. 403); vacated, 28 L. D. 373.
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- Heilman *v.* Syverson (15 L. D. 184); overruled, 23 L. D. 119.
- Heinzman et al. *v.* Létroade's Heirs et al. (28 L. D. 497); overruled, 38 L. D. 253.
- Heirs of Davis (40 L. D. 573); overruled, 46 L. D. 110.
- Heirs of Philip Mulnix (33 L. D. 331); overruled, 43 L. D. 532.
- *Heirs of Stevenson *v.* Cunningham (32 L. D. 650); overruled so far as in conflict, 41 L. D. 119. (See 43 L. D. 196.)
- Heirs of Talkington *v.* Hempsfing (2 L. D. 46); overruled, 14 L. D. 200.
- Heirs of Vradenburg et al. *v.* Orr et al. (25 L. D. 323); overruled, 38 L. D. 253.
- Helmer, Inkerman (34 L. D. 341); modified, 42 L. D. 472.
- Helphrey *v.* Coil (49 L. D. 624); overruled, Dennis *v.* Jean (A-20899); July 24, 1937, unreported.
- Henderson, John W. (40 L. D. 518); vacated, 43 L. D. 106. (See 44 L. D. 112, and 49 L. D. 484.)
- Hennig, Nellie J. (38 L. D. 443, 445); recalled and vacated, 39 L. D. 211.
- Herman *v.* Chase et al. (37 L. D. 590); overruled, 43 L. D. 246.
- Herrick, Wallace H. (24 L. D. 23); overruled, 25 L. D. 113.
- Hess, Hoy, Assignee (46 L. D. 421); overruled, 51 L. D. 287.
- Hickey, M. A., et al. (3 L. D. 83); modified, 5 L. D. 256.
- Hildreth, Henry (45 L. D. 464); vacated, 46 L. D. 17.
- Hindman, Ada I. (42 L. D. 327); vacated in part, 43 L. D. 191.
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- Holden, Thomas A. (16 L. D. 498); overruled, 29 L. D. 166.
- Holland, G. W. (6 L. D. 20); overruled, 6 L. D. 639; 12 L. D. 436.
- Holland, William C. (M. 27696), decided Apr. 26, 1934; overruled in part, 55 I. D. 221.
- Hollensteiner, Walter (38 L. D. 319); overruled, 47 L. D. 260.
- Holman v. Central Montana Mines Co. (34 L. D. 568); overruled so far as in conflict, 47 L. D. 590.
- Hon v. Martinas (41 L. D. 119); modified, 43 L. D. 197.
- Hooper, Henry (6 L. D. 624); modified, 9 L. D. 86, 284.
- Howard, Thomas (3 L. D. 409); see 39 L. D. 162, 225.
- Howard v. Northern Pacific R. R. Co. (23 L. D. 6); overruled, 28 L. D. 126.
- Howell, John H. (24 L. D. 35); overruled, 28 L. D. 204.
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- Hughes v. Greathead (43 L. D. 497); overruled, 49 L. D. 413. (See 260 U. S. 427.)
- Hull et al. v. Ingle (24 L. D. 214); overruled, 30 L. D. 258.
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- Hyde, F. A. (27 L. D. 472); vacated, 28 L. D. 284.
- Hyde, F. A., et al. (40 L. D. 284); overruled, 43 L. D. 381.
- Hyde et al. v. Warren et al. (14 L. D. 576; 15 L. D. 415); see 19 L. D. 64.
- Ingram, John D. (37 L. D. 475); see 43 L. D. 544.
- Inman v. Northern Pacific R. R. Co. (24 L. D. 318); overruled, 28 L. D. 95.
- Interstate Oil Corporation and Frank O. Chittenden (50 L. D. 262); overruled so far as in conflict, 53 I. D. 228.
- Iowa Railroad Land Co. (23 L. D. 79; 24 L. D. 125); vacated, 29 L. D. 79.
- Jacks v. Belard et al. (29 L. D. 369); vacated, 30 L. D. 345.
- Jackson Oil Co. v. Southern Pacific Ry. Co. (40 L. D. 528); overruled, 42 L. D. 317.
- Johnson v. South Dakota (17 L. D. 411); overruled so far as in conflict, 41 L. D. 22.
- Jones, James A. (3 L. D. 176); overruled, 8 L. D. 448.
- Jones v. Kennett (6 L. D. 688); overruled, 14 L. D. 429.
- Kackmann, Peter (1 L. D. 86); overruled, 16 L. D. 464.
- Kemper v. St. Paul and Pacific R. R. Co. (2 C. L. L. 805); overruled, 18 L. D. 101.
- King v. Eastern Oregon Land Co. (23 L. D. 579); modified, 30 L. D. 19.
- Kinney, E. C. (44 L. D. 580); overruled so far as in conflict, 53 I. D. 228.
- Kinsinger v. Peck (11 L. D. 202); see 39 L. D. 162, 225.
- Kiser v. Keech (7 L. D. 25); overruled, 23 L. D. 119.
- Knight, Albert B., et al. (30 L. D. 227); overruled, 31 L. D. 64.
- Knight v. Heirs of Knight (39 L. D. 362, 491; 40 L. D. 461); overruled, 43 L. D. 242.
- Kniskern v. Hastings and Dakota R. R. Co. (6 C. L. O. 50); overruled, 1 L. D. 362.
- Kolberg, Peter F. (37 L. D. 453); overruled, 43 L. D. 181.
- Krigbaum, James T. (12 L. D. 617); overruled, 26 L. D. 448.
- Krushnic, Emil L. (52 L. D. 282, 295); vacated, 53 I. D. 42, 45. (See 280 U. S. 306.)
- Lackawanna Placer Claim (36 L. D. 36); overruled, 37 L. D. 715.
- Lamb v. Ullery (10 L. D. 528); overruled, 32 L. D. 331.
- Largent, Edward B., et al. (13 L. D. 397); overruled so far as in conflict, 42 L. D. 321.
- Larson, Syvert (40 L. D. 69); overruled, 43 L. D. 242.

- Lasselle v. Missouri, Kansas and Texas Ry. Co.* (3 C. L. O. 10); overruled, 14 L. D. 278.
- Las Vegas Grant* (13 L. D. 646; 15 L. D. 58); revoked, 27 L. D. 683.
- Laughlin, Allen* (31 L. D. 256); overruled, 41 L. D. 361.
- Laughlin v. Martin* (18 L. D. 112); modified, 21 L. D. 40.
- Law v. State of Utah* (29 L. D. 623); overruled, 47 L. D. 359.
- Lemmons, Lawson H.* (19 L. D. 37); overruled, 26 L. D. 389.
- Leonard, Sarah* (1 L. D. 41); overruled, 16 L. D. 464.
- Lindberg, Anna C.* (3 L. D. 95); modified, 4 L. D. 299.
- Linderman v. Wait* (6 L. D. 689); overruled, 13 L. D. 459.
- *Linhart v. Santa Fe Pacific R. R. Co.* (36 L. D. 41); overruled, 41 L. D. 284. (See 43 L. D. 536.)
- Little Pet Lode* (4 L. D. 17); overruled, 25 L. D. 550.
- Lock Lode* (6 L. D. 105); overruled so far as in conflict, 26 L. D. 123.
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- Loneragan v. Shockley* (33 L. D. 238); overruled so far as in conflict, 34 L. D. 314; 36 L. D. 199.
- Louisiana, State of* (8 L. D. 126); modified, 9 L. D. 157.
- Louisiana, State of* (24 L. D. 231); vacated, 26 L. D. 5.
- Louisiana, State of* (47 L. D. 366); overruled so far as in conflict, 51 L. D. 291.
- Louisiana, State of* (48 L. D. 201); overruled so far as in conflict, 51 L. D. 291.
- Lucy B. Hussey Lode* (5 L. D. 93); overruled, 25 L. D. 495.
- Luton, James W.* (34 L. D. 468); overruled so far as in conflict, 35 L. D. 102.
- Lyman, Mary O.* (24 L. D. 493); overruled so far as in conflict, 43 L. D. 221.
- Lynch, Patrick* (7 L. D. 33); overruled so far as in conflict, 13 L. D. 713.
- Madigan, Thomas* (8 L. D. 188); overruled, 27 L. D. 448.
- Maginnis, Charles P.* (31 L. D. 222); overruled, 35 L. D. 399.
- Maginnis, John S.* (32 L. D. 14); modified, 42 L. D. 472.
- Maher, John M.* (34 L. D. 342); modified, 42 L. D. 472.
- Mahoney, Timothy* (41 L. D. 129); overruled, 42 L. D. 313.
- Makela, Charles* (46 L. D. 509); extended, 49 L. D. 244.
- Makemson v. Snider's Heirs* (22 L. D. 511); overruled, 32 L. D. 650.
- Malone Land and Water Co.* (41 L. D. 138); overruled in part, 43 L. D. 110.
- Maney, John J.* (35 L. D. 250); modified, 48 L. D. 153.
- Maple, Frank* (37 L. D. 107); overruled, 43 L. D. 181.
- Martin v. Patrick* (41 L. D. 284); overruled, 43 L. D. 536.
- Mason v. Cromwell* (24 L. D. 248); vacated, 26 L. D. 369.
- Masten, E. C.* (22 L. D. 337); overruled, 25 L. D. 111.
- Mather et al. v. Hackley's Heirs* (15 L. D. 487); vacated, 19 L. D. 48.
- Maughan, George W.* (1 L. D. 25); overruled, 7 L. D. 94.
- Maxwell and Sangre de Cristo Land Grants* (46 L. D. 301); modified, 48 L. D. 88.
- McBride v. Secretary of the Interior* (8 C. L. O. 10); modified, 52 L. D. 33.
- McCalla v. Acker* (29 L. D. 203); vacated, 30 L. D. 277.
- McCord, W. E.* (23 L. D. 137); overruled to extent of any possible inconsistency, 56 L. D. 73.
- McCornick, William S.* (41 L. D. 661, 666); vacated, 43 L. D. 429.
- *McCraney v. Heirs of Hayes* (33 L. D. 21); overruled so far as in conflict, 41 L. D. 119. (See 43 L. D. 196.)
- McDonald, Roy* (34 L. D. 21); overruled, 37 L. D. 285.
- *McDonogh School Fund* (11 L. D. 378); overruled, 30 L. D. 616. (See 35 L. D. 399.)

- McFadden et al. *v.* Mountain View Mining and Milling Co. (26 L. D. 530); vacated, 27 L. D. 358.
- McGee, Edward D. (17 L. D. 285); overruled, 29 L. D. 166.
- McGrann, Owen (5 L. D. 10); overruled, 24 L. D. 502.
- McGregor, Carl (37 L. D. 693); overruled, 38 L. D. 148.
- McHarry *v.* Stewart (9 L. D. 344); criticized and distinguished, 56 I. D. 340.
- McKernan *v.* Bailey (16 L. D. 368); overruled, 17 L. D. 494.
- *McKittrick Oil Co. *v.* Southern Pacific R. R. Co. (37 L. D. 243); overruled so far as in conflict, 40 L. D. 528. (See 42 L. D. 317.)
- McMicken, Herbert et al. (10 L. D. 97), (11 L. D. 96); distinguished, 58 I. D. 257, 260.
- McNamara et al. *v.* State of California (17 L. D. 296); overruled, 22 L. D. 666.
- McPeck *v.* Sullivan et al. (25 L. D. 281); overruled, 36 L. D. 26.
- *Mee *v.* Hughart et al. (23 L. D. 455); vacated, 28 L. D. 209. In effect reinstated, 44 L. D. 414, 487; 46 L. D. 434; 48 L. D. 195, 346, 348; 49 L. D. 660.
- *Meeboer *v.* Heirs of Schut (35 L. D. 335); overruled so far as in conflict, 41 L. D. 119. (See 43 L. D. 196.)
- Mercer *v.* Buford Townsite (35 L. D. 119); overruled, 35 L. D. 649.
- Meyer, Peter (6 L. D. 639); modified, 12 L. D. 436.
- Meyer *v.* Brown (15 L. D. 307); see 39 L. D. 162, 225.
- Miller, Edwin J. (35 L. D. 411); overruled, 43 L. D. 181.
- Miller *v.* Sebastian (19 L. D. 288); overruled, 26 L. D. 448.
- Milner and North Side R. R. Co. (36 L. D. 488); overruled, 40 L. D. 187.
- Milton et al. *v.* Lamb (22 L. D. 339); overruled, 25 L. D. 550.
- Milwaukee, Lake Shore and Western Ry. Co. (12 L. D. 79); overruled, 29 L. D. 112.
- Miner *v.* Mariott et al. (2 L. D. 709); modified, 28 L. D. 224.
- Minnesota and Ontario Bridge Company (30 L. D. 77); no longer followed, 50 L. D. 359.
- *Mitchell *v.* Brown (3 L. D. 65); overruled, 41 L. D. 396. (See 43 L. D. 520.)
- Monitor Lode (18 L. D. 358); overruled, 25 L. D. 495.
- Monster Lode (35 L. D. 493); overruled so far as in conflict, 55 I. D. 348.
- Moore, Charles H. (16 L. D. 204); overruled, 27 L. D. 482.
- Morgan *v.* Craig (10 C. L. O. 234); overruled, 5 L. D. 303.
- Morgan *v.* Rowland (37 L. D. 90); overruled, 37 L. D. 618.
- Moritz *v.* Hinz (36 L. D. 450); vacated, 37 L. D. 382.
- Morrison, Charles S. (36 L. D. 126); modified, 36 L. D. 319.
- Morrow et al. *v.* State of Oregon et al. (32 L. D. 54); modified, 33 L. D. 101.
- Moses, Zelmer R. (36 L. D. 473); overruled, 44 L. D. 570.
- Mountain Chief Nos. 8 and 9 Lode Claims (36 L. D. 100); overruled in part, 36 L. D. 551.
- Mt. Whitney Military Reservation (40 L. D. 315); see 43 L. D. 33.
- Muller, Ernest (46 L. D. 243); overruled, 48 L. D. 163.
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NOTE.—The abbreviations used in this title refer to the following publications: "B. L. P." to Brainard's Legal Precedents in Land and Mining Cases, vols. 1 and 2; "C. L. L." to Copp's Public Land Laws, edition of 1875, 1 volume; edition of 1882, 2 volumes; edition of 1890, 2 volumes; "C. L. O." to Copp's Land Owner, vols. 1-18; "L. and R." to records of the former Division of Lands and Railroads; "L. D." to the Land Decisions of the Department of the Interior, vols. 1-52; "I. D." to Decisions of the Department of the Interior, beginning with vol. 53.—EDITOR.

TABLE OF OVERRULED AND MODIFIED INSTRUCTIONS

1933, August 17—Letter of instructions re disbursement of funds to executors and administrators of estates of deceased Osage Indians of less than one-half Indian blood or Indians having certificates of competency; August 17, 1933, instructions overruled in effect by letter of instructions approved April 6, 1936; instructions approved April 6, 1936, modified 58 I. D. 378, 386, 388, 390.

Departmental instructions of January 10, 1936 (letter M. 28257), November 16, 1937 (see 1690586), and November 8, 1939 (see 1791365), concerning Arkansas drainage liens and withdrawal orders are overruled by Solicitor's opinion of October 30, 1942, insofar as they are inconsistent with its holding that drainage liens imposed on public lands in Arkansas under the Caraway Act of January 17, 1920, although constituting rights to Caraway entry and barring withdrawal therefrom, are not rights to homestead entry and do not bar withdrawal of the lien-burdened lands from homestead entry or any other form of disposition under public-land laws. (See 58 I. D. 170, 173, 174, 179.)

1936, September 14—Letter of instructions (M. 28726) re leasing of unreserved public lands; modified, letter of instructions of October 8, 1937 (M. 29482). (See 58 I. D. 203, 210, 213.)

Departmental and General Land Office instructions and determinations concerning withdrawal orders and Minnesota drainage liens on United States lands are overruled by Solicitor's opinion of August 12, 1942, insofar as they are contrary to its holding that drainage liens imposed on public and Indian ceded lands in Minnesota under the Volstead Act of May 20, 1908, although constituting rights to Volstead entry and barring withdrawal from Volstead entry, do not work an appropriation of the land, do not constitute rights to homestead entry and do not bar withdrawal of the lien-burdened lands from homestead entry or any other form of disposition under public-land laws. (See 58 I. D. 65, 74, 80, 81.)

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<i>Circular</i>	<i>Date</i>	<i>Subject</i>	<i>C. F. R. Section</i>
1093a	Dec. 1, 1942	Timber, sale of dead, down, or damaged, or threatened with damage. ¹	284.1-284.22.
1160a	Aug. 9, 1944	Withdrawals for stock driveways and water holes, applications to enter, lease or use lands.	295.7 (c).
1401a	Dec. 1, 1942	Grazing leases ² -----	160.1-160.30.
1461a	Dec. 14, 1942	Rights-of-way, power permits -----	245.1-245.28.
1463a	June 13, 1944	Alaska, officers qualified to administer oaths.	52.1, 65.7.
1470a	Aug. 10, 1942	Five-acre tracts, lease or sale ³ -----	257.1-257.25.
1486a	Aug. 15, 1944	Township plats, filing of -----	240.3.
1513	July 16, 1942	Exchanges, proposals -----	145.1-145.5.
1514	July 28, 1942	Yucca contracts -----	259.1-259.12.
1515	Aug. 3, 1942	Oil and gas exchange leases -----	192.29, 192.86-192.95.
1516	Aug. 14, 1942	War materials, manufacture or production, sale or lease of lands.	260.1-260.17.
1517	Oct. 1, 1942	Grazing leases, procedure ² -----	160.10, 160.15, 160.17-160.19.
1518	Oct. 9, 1942	State selections, grazing districts, springs or water holes.	292.3, 292.8.
1519	Nov. 24, 1942	Sodium permits, amendment -----	195.11.
1520	Dec. 1, 1942	Timber, sale of dead, down, or damaged, or threatened with damage. ¹	284.2, 284.4-284.14, 284.16, 284.20.
1521	Jan. 5, 1943	Oregon, revested and reconveyed lands, permits for rights-of-way for logging roads.	115.114-115.127.
1523	Jan. 14, 1943	Classifications, showing required in petitions.	296.4.
1524	Jan. 20, 1943	Public sales, bids sent by mail -----	250.10.
1525	Apr. 3, 1943	Town sites (reprint with amendments).	255.1-255.54.
1526	Apr. 6, 1943	Color of title claims, filing of applications in duplicate.	140.3.
1528	May 3, 1943	Oil and gas leases, royalties on new fields or deposits.	192.56a-192.56g.
1529	May 17, 1943	Surveys and resurveys, amendments----	185.40, 185.42, Part 240 —fn. 74, 253.6, 281.8, 297.3—fn. 13.
1530	May 18, 1943	Homesteads, additional entry, residence requirement amendment.	166.84.
1531	do -----	Rules of Practice, notice of appeal, filing of briefs.	221.48, 221.79.
1532	May 21, 1943	Soldiers' and Sailors' preference rights, homestead and desert-land entries.	182.1-182.13.
1533	do -----	Exchanges by States under Taylor Grazing Act, Branch of Field Examination, amendments.	147.6, 147.8, 147.13.

¹ Circular 1093a contains the regulations governing the sale of dead, down, or damaged timber, or timber threatened with damage, with amendments to December 1, 1942, sections 284.1-284.22.

² Circular 1401a contains the regulations governing the leasing of public lands, exclusive of Alaska, for the grazing of livestock, with amendments to December 1, 1942, sections 160.1-160.30.

³ Circular 1470a contains the regulations governing the lease or sale of five-acre tracts, with amendments to August 10, 1942, sections 257.1-257.25.

LXXII CIRCULARS OF THE GENERAL LAND OFFICE, ETC.

<i>Circular</i>	<i>Date</i>	<i>Subject</i>	<i>O. F. R. Section</i>
1534	May 26, 1943	State grants for educational, institutional, and park purposes, amendments; appeals.	270.1, 270.7, 270.11, 270.18, 270.22a, 270.28, 270.33, 270.34-270.37, 270.38, 270.40, 270.42-270.46, 270.47, 270.49.
1535	do -----	Desert-land entries, Branch of Field Examination, amendments.	232.7, 232.15, 232.23, 232.35, 232.39, 232.42, 232.45, 232.59.
1536	do -----	5-acre tracts, lease or sale, amendments; appeals.	257.9, 257.22, 257.23, 257.24, 257.25, 257.26, Form 4-776.
1537	do -----	Public sales, record of bidders, cost of publication.	250.10, 250.11.
1538	do -----	Exchanges for migratory bird or other wildlife refuges, Reorganization Plans II and III, amendments.	151.1, 151.2, 151.3, 151.4, 151.11.
1539	do -----	Parks and cemeteries, sale of public lands for.	253.1-253.8.
1540	do -----	Airports and aviation fields, public airport leases, amendments; appeals.	251.6-251.9, 251.10, 251.12, 251.13, 251.14, 251.17.
1541	do -----	Alaska, fur-farm leases, amendments; appeals.	62.2, 62.3, 62.5, 62.7, 62.8, 62.10.
1542	do -----	Alaska, grazing leases, Branch of Field Examination, amendments; appeals.	63.4, 63.5, 63.6, 63.7, 63.8, 63.9, 63.13, 63.17, 63.19, 63.20, 63.24a.
1543	May 21, 1943	Exchanges of privately owned lands under Taylor Grazing Act, Branch of Field Examination, amendments.	146.3, 146.4, 146.9.
1544	May 27, 1943	Silica sands and other non-metallic minerals in Nevada, leases of.	199.1-199.14.
1545	May 28, 1943	Patents in public land cases, issuance and delivery.	108.1.
1546	do -----	National forest homesteads, preference-right claimants.	170.7.
1547	May 29, 1943	Determination of mineral or non-mineral character of lands, amendments.	65.25, 166.49, 230.48, 230.49, 232.29, 233.19, 234.12.
1548	do -----	Alaska, free use of timber on public lands.	79.1-79.13a.
1549	do -----	Oil and gas leases, termination, preference right of lessee to a new lease.	192.14c, 192.14d.
1550	do -----	Abstracters, evidence of title -----	185.56, 211.1.
1551	do -----	Payments, fees for reducing testimony to writing.	216.18.
1552	May 31, 1943	Oil and gas leases ----- 192.16 (Centerhead), 192.15, 192.19, 192.22, 192.23, 192.24, 192.28, 192.31, 192.32, 192.34, 192.35, 192.37, 192.39, 192.41, 192.42a, 192.42b, 192.42c, 192.43, 192.44 (Centerhead), 192.45, 192.51, 192.62, 192.63, 192.64.	192.1, 192.4-13, 192.6-
1553	May 31, 1943	Branch of Field Examination amendments.	All sections in Chapter I affected by change.
1554	do -----	Prefatory note, "Short Titles," amendment, Branch of Field Examination.	Chapter I, pp. 3, 4.
1555	do -----	Timber and stone entries, Branch of Field Examination, amendments.	285.11, 285.12, 285.13, 285.14, 285.18.
1556	do -----	Alaska, district land offices, designation of "register."	All sections in Chapter I affected by change.
1557	do -----	Amendment of entries -----	104.2, 104.7.
1558	do -----	Unlawful enclosures or occupancy, Branch of Field Examination, amendments.	289.4, 289.5, 289.6, 289.8, 289.9, 289.10, 289.11, 289.13, 289.14, 289.15.

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1559	do -----	Public water reserves, reservoirs for watering livestock.	292.27-292.38.
1561	July 10, 1943	Potash permits and leases, revoking section giving special royalty and rental to permittees making first discovery in a new field.	194.6.
1562	Aug. 17, 1943	Oil and gas leases, notice of lease offer	192.18.
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1565	Oct. 25, 1943	Oil and gas leases, procedure for segregating leasing units, and their sale by competitive bidding.	192.17, 192.21.
1566	Nov. 2, 1943	Alaska, homesites or headquarters, Branch of Field Examination, amendment.	64.8.
1567	Jan. 1944	Alaska, homesites or headquarters (reprint with amendments).	64.1-64.10.
1568	Feb. 8, 1944	Oil and gas leases, extension of 5-year leases.	192.14e.
1569	Mar. 8, 1944	Grazing leases, lands needed for Government use; form of lease.	160.22, 160.30.
1570	Mar. 21, 1944	Grazing leases, minimum rental charge	160.23.
1571	Apr. 12, 1944	Alaska, coal lease regulations amended	70.8-70.18, footnote No. 7; 70.10-70.11.
1572	Apr. 15, 1944	Oregon, revested and reconveyed lands, acceptance and rejection of bids.	115.42.
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1576	do -----	Oaths, officers qualified to administer in homestead cases.	166.19.
1577	do -----	Sodium leases, offer of leases by sealed bids or public auction.	195.17-195.18, 195.20.
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1581	Aug. 25, 1944	Stenographer, procurement of by contract procedure in contest cases.	216.18.
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1585	Sept. 23, 1944	Oregon, revested and reconveyed lands, sale of timber, acceptance and rejection of bids.	115.42.
1586	Oct. 21, 1944	Public water reserves, leases for bath houses, hotels, or other improvements.	292.20 (d), 292.21, 292.25-292.26.
1587	Nov. 14, 1944	Coal leases, procedure -----	193.9-193.11, 193.13-193.14.
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DECISIONS
OF THE
DEPARTMENT OF THE INTERIOR
AUTHORITY OF THE SECRETARY TO REGULATE TRAP FISHING IN
ALASKA

*Opinion, March 20, 1942**

ALASKA—LIMITATION OF NUMBER OF TRAP SITES THAT MAY BE OCCUPIED BY INDIVIDUAL—LIMITATION OF AMOUNT OF FISH THAT MAY BE TAKEN BY INDIVIDUAL—AUTHORITY TO ALLOCATE TRAP SITES TO PARTICULAR APPLICANTS.

Pursuant to the authority in section 1 of the act of June 6, 1924 (43 Stat. 464), as amended by the act of June 18, 1926 (44 Stat. 752), the Secretary may issue regulations to limit the number of trap sites that may be occupied by any individual, corporation, concern or combination, and may limit the amount of fish that may be taken, by means of traps, by any individual, corporation, concern or combination. Such regulations are within the authority granted to regulate the extent of fishing and do not contravene the prohibition in the statute against the grant of an exclusive or several right in the maritime public domain. Similar regulations limiting the catch of the individual are commonly found and have been considered by the courts as a proper exercise of the conservation power. However, a regulation to allocate trap sites to individuals would be in conflict with the provision of the statute prohibiting the granting of any exclusive or several right of fishing and is therefore unauthorized.

MARGOLD, *Solicitor*:

In connection with the authority of this Department over the regulation of salmon trap fishing in Alaskan waters; my opinion has been requested on the question:

Whether the Secretary of the Interior has legal authority to limit the number of trap sites that may be occupied by any individual, corporation, concern, or combination, or to limit the amount of fish that may be taken, by means of traps, by any individual, corporation, concern, or combination, or to prescribe rules for the allocation of trap sites to applicants therefor.

Separating this question into its three components, I am of the opinion: (a) that the Secretary of the Interior has legal authority to limit the number of trap sites that may be occupied by any individual, corporation, concern, or combination; (b)* that the Secretary of the Interior also has legal authority to limit the amount of fish

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that may be taken, by means of traps, by any individual, corporation, concern, or combination; and (c) that, subject to special circumstances hereinafter noted, the Secretary of the Interior does not have power to allocate trap sites to particular applicants.

The authority of the Secretary of the Interior to issue regulations concerning commercial fisheries in Alaska is defined by the act of Congress of June 6, 1924 (43 Stat. 464), as amended by the act of June 18, 1926 (44 Stat. 752). The administration of this act was transferred from the Secretary of Commerce to the Secretary of the Interior in accordance with Reorganization Plan No. II (53 Stat. 1431, 1433, 5 U. S. C. sec. 133t). Pertinent provisions of the Alaskan fishing act follow:¹

SECTION 1. That for the purpose of protecting and conserving the fisheries of the United States in all waters of Alaska the Secretary of Commerce from time to time may set apart and reserve fishing areas in any of the waters of Alaska over which the United States has jurisdiction, and within such areas may establish closed seasons during which fishing may be limited or prohibited as he may prescribe. Under this authority to limit fishing in any area so set apart and reserved the Secretary may (a) fix the size and character of nets, boats, traps, or other gear and appliances to be used therein; (b) limit the catch of fish to be taken from any area; (c) make such regulations as to time, means, methods, and extent of fishing as he may deem advisable. From and after the creation of any such fishing area and during the time fishing is prohibited therein it shall be unlawful to fish therein or to operate therein any boat, seine, trap, or other gear or apparatus for the purpose of taking fish; and from and after the creation of any such fishing area in which limited fishing is permitted such fishing shall be carried on only during the time, in the manner, to the extent, and in conformity with such rules and regulations as the Secretary prescribes under the authority herein given: *Provided*, That every such regulation made by the Secretary of Commerce shall be of general application within the particular area to which it applies, and that no exclusive or several right of fishery shall be granted therein, nor shall any citizen of the United States be denied the right to take, prepare, cure, or preserve fish or shellfish in any area of the waters of Alaska where fishing is permitted by the Secretary of Commerce. The right herein given to establish fishing areas and to permit limited fishing therein shall not apply to any creek, stream, river, or other bodies of water in which fishing is prohibited by specific provisions of this Act, but the Secretary of Commerce through the creation of such areas and the establishment of closed seasons may further extend the restrictions and limitations imposed upon fishing by specific provisions of this or any other Act of Congress: * * *

SEC. 2. In all creeks, streams, or rivers, or in any other bodies of water in Alaska, over which the United States has jurisdiction, in which salmon run,

¹ Complete citations for Alaskan fishing act: Act of June 26, 1906 (34 Stat. 478), as amended by act of June 6, 1924 (43 Stat. 464), act of June 18, 1926 (44 Stat. 752), act of February 28, 1929 (45 Stat. 1348), act of April 16, 1934 (48 Stat. 594), act of August 2, 1937 (50 Stat. 557), act of August 14, 1937 (50 Stat. 639), act of April 7, 1938 (52 Stat. 208), and act of July 2, 1940 (54 Stat. 723); act of June 14, 1906 (34 Stat. 263), amended by act of June 25, 1938 (52 Stat. 1174, 48 U. S. C. secs. 221-247).

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and in which now or hereafter there exist racks, gateways, or other means by which the number in a run may be counted or estimated with substantial accuracy, there shall be allowed an escapement of not less than 50 per centum of the total number thereof. In such waters the taking of more than 50 per centum of the run of such fish is hereby prohibited. It is hereby declared to be the intent and policy of Congress that in all waters of Alaska in which salmon run there shall be an escapement of not less than 50 per centum thereof, and if in any year it shall appear to the Secretary of Commerce that the run of fish in any waters has diminished, or is diminishing, there shall be required a correspondingly increased escapement of fish therefrom.

LIMITATIONS UPON TRAP SITES AND CATCH

Because regulations limiting the number of trap sites that may be occupied by any person and those limiting the catch of any person involve identical legal questions, the validity of regulations of both types will be considered as a single question, and separate consideration will subsequently be given to the distinct question of the validity of regulations for the allocation of trap sites to applicants.

In considering whether the statute above set forth authorizes regulations of the former type, it will be appropriate to consider three questions. In the first place, the question arises whether regulations of the character proposed are within the scope of the second sentence of the Alaskan fishing act, which expressly confers upon the Secretary a power to limit the extent of fishing. In the second place, if we find the proposed regulations to be within the scope of this authorization, we may properly consider whether the proposed regulations are invalidated by the proviso in the third sentence of the statute, which expressly prohibits regulations of certain types. Finally, we may consider whether the proposed regulations are inconsistent with the general purpose set forth in the first sentence of the statute and amplified in the second section thereof.

The first of these questions is the simplest. It is clear that a regulation limiting the number of trap sites that may be occupied by any individual is a regulation relating to the "extent of fishing" and, therefore, a regulation expressly authorized by the second sentence of the statute. It is even clearer that a regulation limiting the amount of fish that may be taken, by means of traps, by any individual is a regulation relating to the "extent of fishing" and therefore expressly authorized. Certainly the proposed regulations affect the "extent of fishing" in which any individual may engage. If it be argued that the second sentence of the statute is intended to confer upon the Secretary simply a power to impose limits on fishing *in general*, rather than fishing by any individual, I think it appropriate to observe, in the first place, that no such limitation is

found in the statute, or can reasonably be read into the statute, and, in the second place, that even if the express statutory power of the Secretary were simply a power to limit the total extent of fishing, regulations limiting the extent of fishing by individuals would constitute a natural and appropriate method of achieving the larger result.² This is true whether or not the regulations under consideration be supplemented by additional regulations limiting the number of individuals that may hold trap sites in any given season, and whether or not they be buttressed by other regulations limiting the amount of fish that may be caught, or the number of traps that may be maintained, in any given area. Clearly, it is not necessary to demonstrate that any particular regulation established by the Secretary must offer a complete or an exclusive solution of the conservation problem. To bring any regulations within the scope of the broad discretion conferred by the statute, it is enough that the regulation has a natural tendency to aid in the accomplishment of the stated objective.

Since, then, it is clear that a regulation along the lines proposed is within the authority conferred by the second sentence of the statute, we may proceed to inquire whether the authority so granted is withdrawn or limited by the proviso to the third sentence. This proviso imposes three conditions upon the regulation-making power of the Secretary. It provides, in the first place, that every such regulation "shall be of general application within the particular area to which it applies." In the second place, it specifies "that no exclusive or several right of fishery shall be granted therein." And, in the third place, the proviso declares that no citizen of the United States shall "be denied the right to take * * * fish * * * in any area of the waters of Alaska where fishing is permitted * * *."

The first of these conditions, requiring that regulations must be of general application, is clearly met by the proposed regulations relating to the number of trap sites that may be occupied, and the amount of fish that may be trapped, by any individual. These regulations impose the same limitation upon every citizen of the United States. They offer no preferences and no exemptions.

The second condition of the proviso prevents the granting of any "exclusive" or "several" right of fishery. Clearly, the proposed regulations do not grant to anybody an "exclusive" or "several" right of fishery. Rather, they constitute a limitation upon such rights as might be acquired under the common law in the absence of a conservation statute.

² See authorities cited at pp. 8-10, *infra*.

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It may be argued that while the proposed regulations do not, as of the time of issuance, grant any "exclusive" or "several" right, they might nevertheless contribute to the creation of such rights. It is true that if a given individual has set traps or caught fish up to the maximum limit, he would thereupon be excluded from establishing additional traps in other areas. Under these circumstances, it may be argued that the right to establish traps or to fish in such areas ceases to be a right equally shared by all citizens of the United States and becomes a "several" right limited to those individuals who have not exhausted their limits. This argument, however, seems to me to be without practical, legal, or logical merit.

Practically, it is absurd to say that the proposed regulation grants a several right to those individuals who do not establish the maximum number of traps. From any practical standpoint, the right generally vested in citizens of the United States to establish fish traps in Alaskan waters remains a general right (rather than a "several" or "exclusive" right) even though certain individuals may be temporarily excluded from the exercise of that right either through their own action (as in the case of one who has exhausted his seasonal quota or has limited his right by contract) or by involuntary circumstances (as in the case of the man who cannot catch fish because he is in jail).

Legally, the argument that the proposed regulations would establish rights in severalty is subject to two fatal objections. In the first place, the individual who has selected the areas in which to exercise his common right to build fish traps cannot be heard to complain that the regulations exclude him from those areas which he has not chosen. If there has been any exclusion, it has been self-exclusion. In the second place, a right vested in a general class from which certain designated individuals have been excepted cannot properly be called a "several" right. When an individual homesteader, by acquiring the full limit of land that the law allows to an individual, withdraws himself from the generality of the citizenry that may thereafter secure homesteads on the public domain, the right that remains in the public that has not yet secured homesteads continues to be a *common* or *general* right and does not become a "several" right merely because one individual has been subtracted from the generality. Similarly, under the proposed regulations, the fact that a given company has established the maximum number of traps that the regulation allows, or caught the maximum number of fish by trap, does not transform the right vested generally in the citizenry of the United States from a general right to a "several" right.

Finally, it may be observed that in logic, as in law, a general class to which any predicate or relation is ascribed does not cease to be a general class when one or more individuals are subtracted from it.

I conclude, therefore, that whether the matter be looked at from the standpoint of practical result, or from the standpoint of legal analogy, or from the standpoint of logic, the regulations in question cannot fairly be said to contravene the statutory prohibition against a grant of "exclusive or several right" in the maritime public domain. On the contrary, the whole effect and purpose of the regulations is to cut down the extent of rights enjoyed, under regulations heretofore in force, by those individuals or combinations that have in fact tended to monopolize an increasing portion of the fisheries of Alaska.³

The third clause of the proviso under consideration declares that no citizen of the United States shall be denied the right to take fish in any area where fishing is permitted. I am of the opinion that the proposed regulations clearly do not deny to any citizen of the United States the right to take fish in any area where fishing is permitted and therefore do not violate the prohibition in question. In fact, the proposed regulations safeguard to a higher degree than any regulations heretofore in force that equality of opportunity which the proviso is designed to secure.

On this point, as on the preceding point, a technical argument may be made to the effect that under the proposed regulations certain citizens of the United States, namely those that have already set up the maximum number of traps allowed, would be denied the right to trap fish in all other areas. This technical argument is, in my opinion, subject to the practical, legal, and logical objections already noted in analyzing the second clause of the proviso. Furthermore, the argument is one that, if valid, would be applicable to regulations heretofore in existence, as well as to the proposed regulations. In fact, an attempt has recently been made to invalidate regulations heretofore in force, on the ground that they exclude certain citizens of the United States (i. e., latecomers) from trapping fish in areas where other individuals (i. e., prior possessors) are permitted to trap fish. This attack on the regulations was directed in part to the regulations which in effect provide that when a fish trap has been established by any individual, no other individual may trap fish within a radius of one statute mile⁴ therefrom. In

³ See p. 8, fn. 5, *infra*.

⁴ 50 CFR 205.10. This is the distance set for the Alaska Peninsula area. The distance varies some in other areas, and the regulations in some areas prescribe the distance between traps and certain other types of gear as well as between traps.

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upholding the regulations against this attack, the United States Court of Appeals for the District of Columbia took the position that the proviso in question merely established a rule of uniformity and that since the individuals attacking the regulations originally had the same legal rights to acquire trap sites as anyone else, they could not validly complain of the fact that other individuals had established prior possession of all available trap sites (*Dow v. Ickes*, 123 F. (2d) 909). In reaching this result the court declared:

Obviously the limitation was not intended to guarantee unlimited trap fishing * * *.

Its only other feasible meaning would be an equal or fair opportunity for appellant to share in the sites which have been allocated.

Since, under the proposed regulations, there would be no allocation of sites to particular individuals, and all citizens of the United States would have "an equal or fair opportunity" to share in the sites made available, the proposed regulations are entirely consistent with the limitation of the proviso as that proviso has been interpreted by the Court of Appeals.

The foregoing considerations demonstrate that the proposed regulations,—limiting the number of trap sites that may be occupied and the number of fish that may be trapped by any individual,—come within the express authorization of the second sentence of the statute and do not fall within the scope of the prohibitory proviso in the third sentence. This, it seems to me, sufficiently disposes of any legal objection to the validity of these regulations.

It may be argued, however, that the proposed regulations are inconsistent with the purpose which the Secretary of the Interior is authorized to achieve under the statute. According to this view, the purpose of the statute is to authorize regulations in the interest of conservation; but the proposed regulations would have certain consequences that have nothing to do with conservation; therefore the proposed regulations are invalid.

Underlying this argument is the assumption that an administrator charged with rule-making power under a statute is necessarily precluded from giving any weight to any considerations of public policy other than those expressly set forth in the statute. I find no warrant for any such assumption. If an administrator may achieve the declared statutory purpose of conservation through several alternative types of regulation it is certainly appropriate for him to consider whether one type of regulation would be more expensive or less expensive to administer than another, or would have a more serious or less serious effect in disrupting existing transportation arrange-

ments, or would result in a more equitable or less equitable distribution of fishing rights, even though none of these subsidiary factors be specifically mentioned in the statute. The discretion which the statute here confers upon the Secretary to promulgate such regulations "as he may deem advisable" necessarily authorizes a consideration of all those factors which may, in the opinion of the Secretary, help to determine whether a particular mode of regulation is "advisable." Therefore I am constrained to hold that it is no valid objection to the proposed regulations that they may entail socially valuable consequences not expressly considered in the statute, such as the elimination of monopolistic practices.⁵

There is, however, a second and more fundamental weakness in the argument that regulations of the type here under consideration would go beyond the purpose of the statute. That weakness is the failure to recognize that limitation of the extent to which an individual may fish is, and has always been considered, a conservation measure.

Limitations upon the extent of fishing of the individual are found in the statutes and regulations which have been used as conservation measures in every one of the 48 States. In every State a statute either sets individual catch limits or delegates the authority to set such limits to an administrative agency. Many of these provisions, of course, relate only to sport fishing rather than to commercial fishing, but this is not always true and in either case they are conservation measures. Many of the States also limit the number of hooks or lines that an individual may use. Three examples of State limitation on commercial fishing are:

Alabama Code Ann. (Michie 1928), sec. 2761—limits the oyster take to 3,500 barrels a week per person or corporation;

⁵ In actual practice, though not in law, holders of trap sites are considered owners. If a trap site is once occupied, others will not attempt to jump it the following season. The high cost of trap equipment makes it uneconomic to race for new sites each season (Gregory and Barnes, *North Pacific Fisheries*, pp. 52, 85, fn. 4), and the person who has once occupied a trap site has his equipment 'close at hand, giving him an advantage in gaining prior possession each year which would be costly to overcome. The result of this practical situation is that trap sites are in fact considered as owned to the extent that they are bought and traded and large companies can obtain and hold numerous traps in spite of the fact that each year theoretically all trap sites are open to competition for prior possession.

The seriousness of the monopolistic practices that prevail in the distribution of trap sites in Alaskan waters is indicated by the fact that about one-half of the total catch of salmon in Alaska is taken by fish traps (Gregory and Barnes, *North Pacific Fisheries*, p. 52), and that in 1937 out of 453 floating and pile-driven traps 9 operators controlled 214 and the 5 principal operators controlled 171. (Bower, *Alaska Fishery and Fur Seal Industries*, 1937, pp. 104, 105; Gregory and Barnes, *North Pacific Fisheries*, p. 105.)

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Delaware Rev. Code (1935), sec. 2897—limits the oyster take to 25 bushels a day;

Massachusetts Ann. Laws, ch. 130, sec. 72—limits the number of scallops that may be taken to 10 bushels a day per person.

Limitation on the catch per individual is also used elsewhere as a conservation measure. In Alaska the number of trout that may be taken by an individual has been limited by regulations of the Secretary of the Interior *under authority of the statute herein under consideration*. 50 CFR 190.6, 190.7, 190.8. Similar regulations have been issued by the Secretary of the Interior with respect to black bass in the Carolina Sandhills Wildlife Refuge. 6 F. R. 3216. Analogous to the limitation of the number of traps per individual are the present regulations in Alaska, under authority of the legislation here considered, which limit each boat to not more than four trolling lines, 50 CFR 201.12, or to only one seine, 50 CFR 207.9. In England and Wales fishery boards have extensive powers to regulate by bylaw the maximum amount of fish that may be retained by any person in any one day. (Laws and Regulations in Summary Concerning Salmon and Trout Fisheries, p. 8, compiled by T. E. Pryce-Tannatt, February 1936, Conseil Permanent International Pour L'Exploration de la Mer, Rapports et Procès-Verbaux Des Réunions, vol. 96.) The Province of British Columbia sets bag limits per individual for sport fishing. (Special Fishery Regulations for the Province of British Columbia, Canada, April 15, 1941, sec. 24, par. 10; sec. 25, par. 2.) The Province of Alberta, Canada, sets both an individual per diem catch limitation and an over-all limitation for the season for the area. (Special Fishery Regulations for the Province of Alberta, March 31, 1938, secs. 3, 10.)

State courts have upheld catch limitations per individual as a proper exercise of the conservation power. In *State v. Nergaard*, 124 Wis. 414, 102 N. W. 899, 901, 902 (1905), which involved the violation of a provision limiting the quantity of fish that could be transported, the court said:

We believe it has never been seriously denied (and it is now certainly too late to deny) that the state has the right, in the exercise of its police power, to make all reasonable regulations for the preservation of fish and game within its limits. It may ordain closed seasons; it may prescribe the manner of taking, the times of taking, and the amount to be taken within a given time, as it may deem best for the purpose of preserving and perpetuating the general stock. * * * *The modes in which the state may limit the amount to be legally taken are various.* It may doubtless interdict the taking of certain game for a series of years, if it deems such course necessary for the preservation of the species, or *it may prohibit the taking of more than a certain amount by any one person within a given time.* We do not perceive why it may not

also, as a means of accomplishing the same end, prohibit the shipment or sale of more than a given quantity within a given period of time. * * * [Italics supplied.]

Other cases support the right of a State to regulate the quantity of fish to be taken per person. *State v. Cozzens*, 2 R. I. 561 (1850); *Commonwealth v. Bailey*, 13 Allen (95 Mass.) 541 (1866); *State v. Savage*, 96 Ore. 53, 184 Pac. 567; 189 Pac. 427 (1919).

If, then, the limitation of the extent to which an individual may fish has been considered as a conservation measure and used as a part of systems of conservation and the Secretary is granted authority to limit the extent of fishing as he deems advisable, the statutory declaration of a public purpose in favor of conservation does not render invalid a regulation limiting the catch of an individual by trap or the number of traps an individual may hold.

The argument that the proposed regulations are invalid because they may tend to eliminate monopolistic practices, and such practices have nothing to do with conservation, is subject to a third fatal weakness. The provision of the statute that no citizen shall be denied the right to fish in any area where fishing is permitted requires the Secretary to give consideration to the effect of regulations on the opportunity of all to fish so that as equal an opportunity as is possible will result. This provision of the statute is an express statutory indication of the policy which should guide the Secretary in making regulations, and the proposed regulations insure that more citizens will be able to exercise the right than have been able to do so heretofore.

Considering, then, all of the relevant provisions of the Alaskan fishing act, I am of the opinion that the act expressly and clearly authorizes regulations limiting the number of trap sites that may be occupied, or the amount of fish that may be trapped, by any individual, corporation, concern, or combination.

Apart from the statute, the objection may be raised that the issuance of regulations of the character proposed would interfere with vested rights in the fisheries of Alaska.

The short answer to this objection is that there are no such vested rights. One who maintains a fish trap in Alaskan waters has no right of ownership in the site, no right as against the United States, and no right of any sort against any third party except the right which any individual on a public street or on the public domain may claim, namely, the right that he and his belongings shall not be removed or physically interfered with by any third party.

The fact that one has occupied the site the season before or for a number of seasons gives no prescriptive right to the site. *Thlinket*

March 20, 1942

Packing Co. v. Harris & Co., 5 Alaska 471 (1916); *Columbia Salmon Co. v. Berg*, 5 Alaska 538 (1916); *Alitak Packing Co. v. Alaska Packers' Ass'n*, 6 Alaska 277 (1920); *Alaska General Fisheries v. Smith*, 7 Alaska 635 (1927).

It is true that the Secretary of War, under section 10 of the Rivers and Harbors Act of March 3, 1899 (30 Stat. 1121, 1151), issues permits which certify that the erection of a fish trap at the point named will not interfere with navigation. These permits give no property right, and the War Department makes no determination between several applicants as to their right to occupy the trap site. The Territory of Alaska issues licenses to take fish from Alaskan waters, but these licenses confer no property right and no determination is made between applicants as to the right to occupy a trap site. *Thlinket Packing Co. v. Harris & Co.*, *supra*; *Columbia Salmon Co. v. Berg*, *supra*; *Alitak Packing Co. v. Alaska Packers' Ass'n*, *supra*; *Alaska General Fisheries v. Smith*, *supra*; *Cummings v. Chicago*, 188 U. S. 410 (1903).

Legally, trap-site holders in Alaska have no ownership in the trap sites beyond the common right of fishery, which depends entirely upon prior and continued possession, and which must be renewed each season by taking prior possession of the site. Therefore new regulations will not interfere with vested rights.

With regard to the proposed regulations here analyzed, there is the further consideration that, if issued, no individual would be legally empowered to attack them. To support such an attack, the infringement of some special right or interest must be shown by the person attacking the regulations. *Dow v. Ickes*, *supra*; *cf. Massachusetts v. Mellon*, 262 U. S. 447 (1923), and cases cited in note 12 of the court's opinion in the *Dow* case. Another obstacle to attack upon such regulations is that the courts have no power to direct the Secretary as to the manner in which his discretion shall be exercised if the power to exercise discretion is established. *Dow v. Ickes*, *supra*, and cases cited in note 10 of the court's opinion in that case.

ALLOCATION OF TRAP SITES

The third type of regulation which I am asked to consider would provide for allocation of trap sites to individuals. This would seem to be directly in conflict with the provision of the statute that prohibits the granting of any exclusive or several right of fishery. Under regulations limiting the catch per individual or the number of traps per individual, the Department would make no determination between individuals as to their relative rights to any particular

trap site. Control of trap sites would continue to depend upon priority of possession. If allocation of trap sites were made, it would amount to saying who could fish, which would be a grant of the right to fish to some and a denial to others. Such action is outside the authority of the Secretary under the above-cited act. This opinion, however, does not take into consideration the possible power to safeguard any special fishing rights that may be found to be lodged in Alaskan natives or native communities. Nothing in this opinion is intended to cover the question of whether the Secretary of the Interior is or is not vested with any such special power or responsibility with respect to Alaskan natives.

The court in the *Dow* case, after stating that the statute prescribed specific methods by which the Secretary may limit fishing, noted that it was not intended to intimate that the statutory enumeration of methods is exclusive of others. It might be added that other conservation measures that have been used elsewhere might also be considered by the Secretary if additional regulations which would achieve a greater equality in the opportunity to fish are to be issued. For example, limitations in the interest of conservation have been placed upon the number of fish possessed, sold or transported by individuals.

The Attorney General concurred with the foregoing opinion on April 8, 1942 (40 Op. Atty. Gen., No. 41).

OIL AND GAS LEASES ON ALLOTTED INDIAN LANDS

Opinion, July 2, 1942

INDIAN OIL AND GAS LEASES—PRIMARY TERM—ASSIGNMENTS—ALLOTTED INDIAN LANDS.

The Department cannot validly approve assignments of oil and gas leases on allotted Indian lands unless it finds that the leases are still in effect. Where drilling operations were commenced during the primary term of an oil and gas lease, a showing must be made that the drilling operations were in conformity with applicable regulations in order to extend the lease beyond the primary term.

Where an oil and gas lease provides that should the lessee be unable to market the production from the leased land he may, with the consent of the Secretary of the Interior, discontinue operation of the producing wells thereon, a lease may not be considered in force beyond its primary term if the lessee discontinues production because of the lack of storage facilities unless he has first obtained the consent of the Secretary of the Interior.

An oil and gas lease may not be extended beyond its primary term where neither production nor the completion of a well commenced during the primary term is shown.

July 2, 1942

COHEN, *Acting Solicitor*:

You [Secretary of the Interior] have requested my opinion on the question of whether oil and gas leases Nos. 1285, 1288, and 1289 covering allotted lands on the Crow Indian Reservation, Montana, remain in force after the expiration of their primary terms of 10 years each. Lease No. 1285, on lands owned by Frederick Alden, was approved by you on May 29, 1931. Lease No. 1288, on land owned by John Alden, was approved by you on August 28, 1931. Lease No. 1289, on land owned by the heirs of Mary Reed, deceased, was also approved by you on August 28, 1931. The three leases are on the same lease form. The assignment of these three leases to the Midland Empire Oil Company was approved by the Department on January 16, 1934. The Sun Ray Oil Company now requests approval of the assignment of these three leases to it by the Midland Empire Oil Company. The Department cannot validly approve these assignments, unless it finds that the leases are still in effect.

Section 2 of each lease provides that the lessee shall hold the land—

* * * for the term of ten years from and after the approval hereof by the Secretary of the Interior, and as much longer thereafter as oil, gas, casing head gas or any one of them, is produced in paying quantities from said land by lessee, * * * or as much longer thereafter as lessee is engaged in completing the drilling of a well commenced during the ten-year term, provided such drilling is prosecuted to completion of the well with due diligence, and if such drilling operations result in the finding of any one of the substances covered hereby, then this lease shall remain in force as long as such substance is produced in paying quantities: *Provided*, should lessee be unable to market the production from said land he may, with the consent of the Secretary of the Interior, discontinue the operation of the producing wells thereon and this lease shall remain in force notwithstanding such cessation of operations * * *.

The primary or fixed period of 10 years provided for in each lease has expired. The question in each case, therefore, is whether the lease terminated at the end of the 10-year period or whether the lease continued in force beyond that period. By what is known in the nomenclature of the oil industry as the "thereafter clause," contained in section 2 of these leases, each lease specifies with particularity the conditions upon which extension of the lease beyond the 10-year period depends. Unless the conditions specified are met, it is firmly established that the lease terminates, not by forfeiture, but by expiration of the period fixed by the contract of the parties. *Sawyer v. Potter*, 3 S. W. (2d) 758 (1928); *Batten v. Campbell*, 3 S. W. (2d) 760 (1928); *Pace Lake Gas Co., Inc. v. United Carbon Co.*, 148 So. 699 (1933); *Berthelote v. Loy Oil Co.*, 28 P. (2d) 187 (1933); *Tedrow v. Shaffer*, 155 N. E. 510 (1926); *Producers' Oil &*

Gas Co., Inc. v. Continental Securities Corp., 177 So. 668 (1937); *Hoffman v. Overton Refining Co.*, 110 S. W. (2d) 93 (1937); *Stephenson v. Calliham*, 289 S. W. 158 (1926); *J. J. Fagan & Co. v. Burns*, 226 N. W. 653 (1929). Neither payment of rent nor excuses for nonperformance can avoid that result. *Baldwin v. Blue Stem Oil Co.*, 189 Pac. 921. No act or declaration of the lessee can revive the lease. *Griffith v. Cedar Creek Oil & Gas Co.*, 8 P. (2d) 1071. And no notice to the lessee of the expiration of the lease is required. *Stephenson v. Calliham*, *supra*; *Producers' Oil & Gas Co., Inc. v. Continental Securities Corp.*, *supra*; *Ison v. Edra Lee Oil & Gas Co.*, 45 S. W. (2d) 3. With these principles in mind, the situation with respect to each lease will be discussed separately.

Lease No. 1285.

Prior to May 29, 1941, the Geological Survey approved a well location on this lease. On May 28, a few hours before the expiration of the 10-year period, a well was spudded. On July 28, it was discovered that the well was not on the location approved by the Geological Survey but instead was less than 200 feet from the lease boundary in violation of your regulations (30 CFR 221.8), to which the lease is subject (sec. 12). On August 6 approval to drill the well was rescinded and since that time drilling operations have been suspended. The oil and gas supervisor of the Geological Survey at Casper, Wyoming, reports that while he has had oral discussions with a representative of the Sun Ray Oil Company since the rescission of authority to drill on August 6, these discussions were limited to whether the company would be permitted to continue the well started at a location less than 200 feet from the boundary. There is nothing in the present record to show that after August 6 the company ever applied for permission to drill on the location formerly approved or on any other location on the lease.

The provision in section 2 of the lease that it may be continued beyond the 10-year term where the lessee is engaged in completing a well commenced during the primary term obviously refers to a well being drilled in conformity with the lease and applicable regulations and not, as in the present case, in violation thereof. Section 2 of the lease provides for the contingency of a well commenced during the fixed term. Had the well commenced prior to the end of the fixed term been on a proper location and had it been completed with reasonable diligence and dispatch, the lease would undoubtedly have continued as long as the well produced oil or gas in paying quantities. However, since no well was commenced in conformity with your regulations during the 10-year period, the lessee has not complied

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with the conditions under which the lease may be extended beyond the fixed term, and the lease must be considered to have expired. *Sawyer v. Potter, supra; Batten v. Campbell, supra.*

Had the company made any attempt, after August 6, to drill a well at a proper location, it might have become necessary to consider whether the spudding of the first well at an improper location was the result of a mistake or whether it was a willful intent to violate the regulations. However, since no attempt at compliance with the lease requirements is shown no consideration need be given to this phase of the matter.

Lease No. 1288.

Under the "thereafter clause" as found in the usual oil and gas lease the lease terminates, after the primary term has expired, when production stops. In order to keep the lease alive it is not only necessary to take the oil from the ground but the oil must also be marketed in order to carry out the purposes for which the lease is made. *Brewster v. Lanyon Zinc Co.*, 140 Fed. 801 (C. C. A. 8, 1905); *Union Gas & Oil Co. v. Adkins*, 278 Fed. 854 (C. C. A. 6, 1922); *Summers, Oil and Gas*, sec 415.

Realizing the hardship of this rule on the lessee in many cases, the Department inserted in the lease under consideration a provision by which the lessee could avoid the application of this general rule. This was done by the proviso contained in section 2 of the lease that the lessee could, with the consent of the Secretary, discontinue the operation of producing wells should he be unable to market the production. Such cessation of operations would not cause a termination of the lease, if done with the consent of the Secretary.

In the present case a well under a former lease had been completed on the land covered by this lease prior to the date of its approval. This well had been shut down in 1923 and did not start to produce again until June 1932 after the effective date of the present lease. Between 1932 and 1939 this well produced approximately 68,000 barrels of oil. It produced no oil in 1939, 1940 or 1941 until the latter part of August 1941. The record shows that about May 20, 1941, the Sun Ray Oil Company, the unapproved assignee of the Midland Empire Oil Company, placed a small crew of men on the lease to get the well in shape for production. Oil was produced from this well about August 20, 1941, approximately one week before the expiration of the 10-year term. The well was shut down shortly thereafter for repair work and after the completion of such work about 200 barrels were produced from the well in September. Three hundred barrels of oil were produced in October and approximately

650 barrels in November, when the well was shut down because all available storage tanks were filled. There were about 1,500 barrels of oil in storage on the lease when the Sun Ray Oil Company took over operations and the storage capacity on the lease is said to be 2,500 barrels.

No oil is shown to have been taken from the well since November 1941 and no sale of any of the oil produced is shown to have been made since October 1941 when 150 barrels of oil were sold. As stated above, the only way the lessee under these circumstances could have kept the lease alive after the expiration of the primary term was by obtaining your consent to the discontinuance of operations under the lease because of a lack of marketing facilities. Neither the lessee nor the Sun Ray Oil Company asked for or received your consent to the cessation of operations under this lease because of such a lack of facilities and there is no showing in the present record to indicate that the failure to empty the storage tanks and continue production from the lease was due to a lack of such facilities.

Since the balance of the oil produced has not been sold and since production was stopped without your consent it must be held that oil is not being produced in paying quantities. When such production stops the lease terminates by its own terms. Therefore, this lease must be considered to have expired. Section 11 of the lease provides that upon the violation of any of the substantial terms and conditions of the lease you have the right at any time after 30 days' notice to the lessee to declare the lease null and void. This section is without application to the present situation where the lease has expired by its own limitations. *Stephenson v. Calliham, supra; Producers' Oil & Gas Co., Inc. v. Continental Securities Corp., supra.*

Lease No. 1289.

The record shows that under a previous lease covering this land a well was completed in 1921 which produced 985 barrels of oil in that year. Due to an accident which occurred at the well when an attempt was being made to deepen it, the well was shut down in 1922 and has remained shut down ever since except for short testing periods. The record does not show that the present lessee ever drilled a well on this land or opened the well shut down in 1922. No production is shown from this lease during the primary term thereof. Since the present lessee and the proposed assignee cannot bring themselves within any of the conditions prescribed in section 2 of the lease, for a continuance of the lease beyond its primary

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terms, this lease must also be held to have expired by its own terms on August 28, 1941.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

MAINTENANCE OF PORTERS' LODGES AND EMPLOYMENT OF SUPERINTENDENTS AT NATIONAL CEMETERIES

Opinion, July 3, 1942

NATIONAL CEMETERIES—PORTERS' LODGES—SUPERINTENDENTS.

Whether the Director of the National Park Service is required by Revised Statutes 4873-4875 to maintain a porter's lodge and to employ a superintendent at each of the national cemeteries under his jurisdiction: *Held*, the Director of the National Park Service is not required to maintain a porter's lodge and to employ a superintendent, when in his judgment, the continuance of the office of cemetery superintendent and the maintenance of a porter's lodge at certain cemeteries is no longer justified.

COHEN, *Acting Solicitor*:

Sections 4873-4875 of the Revised Statutes (sec. 2, 14 Stat. 399; 17 Stat. 135; 37 Stat. 240; 24 U. S. C. secs. 274-276) provide that the Secretary of War shall cause to be erected at the principal entrance of each national cemetery a suitable building to be occupied as a porter's lodge, and authorize him to appoint a meritorious and trustworthy superintendent to reside there who shall be selected from disabled soldiers of the voluntary or regular Army. My opinion has been requested as to whether or not these provisions remain mandatorily in effect as to national cemeteries which have been transferred to the jurisdiction of the National Park Service of the Department of the Interior. More specifically, the question is whether the Director of the National Park Service is required to maintain a porter's lodge and to employ a superintendent at each of the national cemeteries under his jurisdiction when, in his judgment, the continuance of the office of cemetery superintendent and the maintenance of a porter's lodge at certain cemeteries is no longer justified. My answer is in the negative for reasons hereinafter set forth.

Title IV of Part II of the Legislative Appropriation Act, fiscal year 1933, as amended by section 16 of the act of March 3, 1933 (47 Stat. 1517), provides:

Sec. 401. The Congress hereby declares that a serious emergency exists by reason of the general economic depression; that it is imperative to reduce drastically governmental expenditures; and that such reduction may be accom-

plished in great measure by proceeding immediately under the provisions of this title.

Accordingly, the President shall investigate the present organization of all executive and administrative agencies of the Government and shall determine what changes therein are necessary to accomplish the following purposes:

(a) To reduce expenditures to the fullest extent consistent with the efficient operation of the Government;

(b) To increase the efficiency of the operations of the Government to the fullest extent practicable within the revenues;

(c) To group, coordinate, and consolidate executive and administrative agencies of the Government, as nearly as may be, according to major purposes;

(d) *To reduce the number of such agencies by consolidating those having similar functions under a single head, and by abolishing such agencies and/or such functions thereof as may not be necessary for the efficient conduct of the Government;*

(e) *To eliminate overlapping and duplication of effort; * * * [Italics supplied.]*

As originally enacted, section 406 of the act (47 Stat. 414) excepted agencies "created by statute" from the provisions of the act and specifically denied the President the authority to abolish such agencies. But section 406, as amended by the act of March 3, 1933 (47 Stat. 1517), eliminated the provision excepting agencies created by statutes. Consequently it would appear that the act as amended authorizes the abolition of offices or agencies created by statute in the same manner and to the same extent as offices or agencies not so created.

Under the authority of the above-quoted statutory provisions Executive Order No. 6166 was issued June 10, 1933 (see 5 U. S. C. sec. 132, note (1934 and 1940 ed.)). Section 2 of said Executive order states in part:

All functions of administration of public buildings, reservations, national parks, national monuments, and national cemeteries are consolidated in an Office of National Parks, Buildings, and Reservations in the Department of the Interior, at the head of which shall be a Director of National Parks, Buildings, and Reservations; except that where deemed desirable there may be excluded from this provision any public building or reservation which is chiefly employed as a facility in the work of a particular agency. This transfer and consolidation of functions shall include, among others, those of the National Park Service of the Department of the Interior and the National Cemeteries and Parks of the War Department which are located within the continental limits of the United States.

However, Executive Order No. 6166 was interpreted by Executive Order No. 6228 issued July 28, 1933 (see 5 U. S. C. sec. 132, note (1934 and 1940 ed.)), as transferring to this Department only 11 national cemeteries. The transfer of other national cemeteries within the continental United States was "postponed until further order." The national cemeteries transferred are adjacent to or in

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the immediate vicinity of either a national park or battlefield site which in each case is also under the jurisdiction of this Department. It appears obvious, therefore, that the cemeteries transferred were selected with the view that their administration could be consolidated with the administration of adjacent national parks or battlefield sites under a single head. Moreover, it is understood that certain of these cemeteries are now full and burial therein has been discontinued and that burials in several others will be discontinued in the near future due to lack of space. Consequently as these cemeteries become inactive, if not before, it would seem even more desirable that their administration be fully consolidated with the administration of adjacent parks or battlefield sites under one head or superintendent. Until this is done, it would appear that the consolidation contemplated by the act and the Executive orders cited will not have been effected.

Executive Order No. 6166 contains no specific directions as to the organization of the work of the successor agency. The allocation of positions, equipment, facilities, etc., is left to the discretion of the administrator of such agency. Section 19 of said order provides:

Each agency, all the functions of which are transferred to or consolidated with another agency, *is abolished.*

The records pertaining to an abolished agency or a function disposed of, disposition of which is not elsewhere herein provided for, shall be transferred to the successor. If there be no successor agency, and such abolished agency be within a department, said records shall be disposed of as the head of such department may direct.

The property, facilities, equipment and supplies employed in the work of an abolished agency or *the exercise of a function disposed of*, disposition of which is not elsewhere herein provided for, shall, to the extent required, be transferred to the successor agency. Other such property, facilities, equipment, and supplies shall be transferred to the Procurement Division.

All personnel employed in connection with the work of an abolished agency or *function disposed of shall be separated from the service of the United States*, except that the head of any successor agency, subject to my approval, *may, within a period of four months after transfer or consolidation, reappoint any of such personnel required for the work of the successor agency without re-examination or loss of civil-service status.* [Italics supplied.]

Section 21 of said Executive order lists the following definitions:

As used in this order—

"Agency" means any commission, independent establishment, board, bureau, division, service, or office in the executive branch of the Government.

"Abolished agency" means any agency which is abolished, *transferred, or consolidated.*

"Successor agency" means any agency to which is transferred some other agency or function, or which results from the consolidation of other agencies or functions.

"Function disposed of" means *any function eliminated or transferred*. [Italics supplied.]

Thus, it is seen that under the explicit terms of the Executive order all positions were abolished and all employees were separated from the service in connection with the work of transferred functions. This means, of course, that the offices of the cemetery superintendents were abolished and the incumbents of such offices were separated from the service. It is true, the administrator of the successor agency, the Director of the Office of National Parks, Buildings and Reservations,¹ in organizing the work of his agency recreated the positions of cemetery superintendents. These appointments were, however, not made pursuant to the mandatory direction of section 4873 of the Revised Statutes (24 U. S. C. sec. 274), that a superintendent "shall" be appointed. They were made pursuant to the discretionary provision of section 19 of the reorganization order that reappointments "may" be made, the mandatory provision of section 4873 having been superseded by section 19 of the reorganization order. And the general rule is that the discretionary authority to create an administrative position carries with it the discretionary authority to abolish it. *Cf. Higginbotham v. Baton Rouge*, 306 U. S. 535. Nor does it appear that civil-service laws or rules prevent the abolition of an office in good faith to reduce expenses.² *Fitzsimmons v. O'Neill*, 214 Ill. 494, 73 N. E. 797; *Gardner v. City of Lowell*, 221 Mass. 150, 108 N. E. 937. *Cf. United States ex rel. Rhodes v. Helvering*, 84 F. (2d) 270; *Longfellow v. Gudger*, 16 F. (2d) 653. The work done by the employee whose office is abolished may, of course, be assigned to another qualified employee. *State v. City of Seattle*, 109 Wash. 629, 187 Pac. 339. *Cf. Henry H. Stilling v. The United States*, 41 Ct. Cl. 61; *Garnett S. Brown v. The United States*, 39 Ct. Cl. 255.

When and if the positions of cemetery superintendents are abolished, it would appear that the maintenance of porters' lodges as such would no longer be required. Property, facilities, and equipment of abolished agencies were transferred to the successor agency "to the extent required." It is clear from the Executive order that after transfer to a successor agency, transferred property, facilities, and equipment are to be administered by such successor agency in the same manner as other property, facilities, and equipment ad-

¹ The Office of National Parks, Buildings and Reservations, established by Executive Order No. 6166 in the Department of the Interior, was renamed the National Park Service by the act of March 2, 1934 (48 Stat. 362, 389).

² Effective February 1, 1939, the positions of cemetery superintendents were covered into the classified service by Executive Order No. 7916, dated June 24, 1938 (3 CFR, Cum. Supp., p. 350).

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ministered by the agency. No restrictions were placed on the allocation of uses of the transferred property, facilities, and equipment, and there is nothing to suggest that new allocations to meet changing conditions could not be made.

The foregoing refers to auxiliary or incidental property, not to the cemeteries themselves. The cemeteries are required to be maintained and administered as specified in the statutes in question (24 U. S. C. secs. 271-281). This obligation to maintain and administer the cemeteries was not abolished by Executive Orders Nos. 6166 and 6228. These orders provided that the "functions of administration of * * * national cemeteries are consolidated in an Office of National Parks, Buildings, and Reservations [National Park Service]." Thus, there was merely a transfer of the obligation to maintain and administer the cemeteries in question to the National Park Service under the Secretary of the Interior.

In my opinion, therefore, the Director of the National Park Service is not required to maintain a porter's lodge and to employ a superintendent at each of the national cemeteries under his jurisdiction when, in his judgment, the continuance of the office of a cemetery superintendent and the maintenance of a porter's lodge at certain cemeteries is no longer justified. He may assign the duties of such superintendents to other qualified personnel and he may allocate porters' lodges to other appropriate uses.

Approved:

ABE FORTAS,

Under Secretary.

OWEN MONTGOMERY AND S. C. MONTGOMERY (ON REHEARING)

Decided July 8, 1942

DEATH VALLEY NATIONAL MONUMENT—MINERAL LEASING ACT OF 1920.

The act of June 13, 1933 (48 Stat. 139, ch. 70, 16 U. S. C. (1940 ed.) sec. 447), which extended to lands in the Death Valley National Monument the laws known as the "mining laws of the United States," did not extend thereto the provisions of the Mineral Leasing Act of 1920.

MINERAL LEASING ACT OF 1920.

The issuance of leases and prospecting permits for sodium is discretionary with the Secretary of the Interior.

CHAPMAN, *Assistant Secretary.*

On May 9, 1942, the Department affirmed a decision of the Commissioner of the General Land Office rejecting applications Sacra-

mento 034231 and 034243 for sodium prospecting permits filed by Owen and S. C. Montgomery under section 23 of the Mineral Leasing Act of February 25, 1920. See 30 U. S. C. (1940 ed.) sec. 261. The land applied for is within the Death Valley National Monument. In its decision, the Department held that the proclamation of February 11, 1933 (47 Stat., part 2, 2554), prevented the disposition of the lands under any of the mineral laws; that the Mineral Leasing Act of 1920, *supra*, was not applicable to lands within national monuments; and that the act of June 13, 1933 (48 Stat. 139, ch. 70, 16 U. S. C. (1940 ed.) sec. 447), which extended to lands in Death Valley National Monument the laws known as the "mining laws of the United States," did not extend thereto the provisions of the Mineral Leasing Act of 1920.

In their consolidated motion for rehearing, the applicants renew their contention that Congress intended the phrase "mining laws of the United States" in the act of June 13, 1933, *supra*, to include the Mineral Leasing Act of 1920. Their arguments in support of that contention consist of references to the fact that the word "mining" appears in the title of the Mineral Leasing Act of 1920, in the regulations with respect to sodium leases and prospecting permits,¹ and in a decision of the Supreme Court in a case concerning the leasing of naval oil reserves.² The same arguments had been set forth in the applicants' appeal, were fully considered by the Department in reaching its decision of May 9, 1942, and were found insufficient to warrant a conclusion contrary to that reached by the Department in its decision. The motion for rehearing presents nothing new on this point and would therefore warrant no change in the Department's decision thereon. *United States v. Frank Hervol*, 57 I. D. 183.

But even upon reconsideration of these arguments, it is still held that none of them is tenable. Since it is admitted that by virtue of the proclamation of February 11, 1933, *supra*, the lands in Death Valley National Monument are not subject to disposition under any of the mineral land laws except to the extent permitted by the act of June 13, 1933, *supra*, the sole issue here is whether that act permits disposition of the lands under the Mineral Leasing Act of 1920. That it does not is plain. It permits disposition of the lands for mineral purposes only under "the mining laws of the United States * * * subject, however, to the surface use of locations, entries, or patents under general regulations to be prescribed by the Secre-

¹ Circ. 1194, 52 L. D. 651, 43 CFR 195.1. Particular reference is made by the applicants to the language in 43 CFR 195.22, 195.24(f), 195.26, section 1.

² *Pan American Petroleum and Transport Co. v. United States*, 273 U. S. 456, 487 (1927).

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tary of the Interior." Like a number of other similar acts,³ it refers only to the "mining laws of the United States," a classification distinctly different from the "mineral leasing laws." The laws relating to mineral lands have been consistently administered by this Department and have been commonly understood on the basis of that distinction. It is true, of course, that the word "mining" is used in the title of the Mineral Leasing Act of 1920, and in the regulations which have been issued pursuant to that act. But there the word is used in its descriptive sense to characterize the manner in which the minerals are removed. It could not conceivably be intended to identify the Mineral Leasing Act of 1920 with the United States mining laws because the two sets of laws represent wholly different systems of disposal of the respective mineral resources. The use of the word "mining" in these few instances in connection with the Mineral Leasing Act of 1920 does not constitute a usage sufficient to abrogate the demarcation between the two types of laws.

Furthermore, the directions in the act of June 13, 1933, plainly refer only to "mining laws of the United States" under which "the surface use of locations, entries, or patents" could be regulated by the Secretary of the Interior. The mineral leasing acts, however, do not provide for "locations, entries, or patents." The language of the act therefore clearly does not include use of the land under the Mineral Leasing Act of 1920. Nor is there anything in the legislative history of the act of June 13, 1933, which could warrant importing into the statute an intention contrary to the plain meaning of the statutory language.

The applicants also argue that the Solicitor's opinion of May 16, 1932 (M. 27025), is erroneous in holding that the Mineral Leasing Act of 1920 does not extend to lands in national monuments. It is not necessary to analyze the validity of that argument. It suffices to reply that since the proclamation of February 11, 1933, *supra*, admittedly prevented the lands in Death Valley National Monument from being subject to disposition under any of the mineral land laws except to the extent permitted by the act of June 13, 1933, *supra*, the sole issue here is whether that act permits disposition of the lands under the Mineral Leasing Act of 1920. And on that point the arguments presented by the applicants do not warrant reversal of the Department's decision.

In conclusion it may be said that even if these lands could be

* See act of June 22, 1936 (49 Stat. 1817, ch. 700, 43 CFR 69.11) (Glacier Bay National Monument in Alaska); act of June 29, 1938 (52 Stat. 1242, ch. 812, 16 U. S. C. (1940 ed.) sec. 252) (Olympic National Park); act of October 27, 1941 (55 Stat. 745, ch. 459) (Organ Pipe Cactus National Monument in Arizona).

disposed of under the Mineral Leasing Act of 1920, this Department would not do so to the present applicants. These lands have been made available to the Defense Plant Corporation, a Government-owned corporation, for use of the sodium deposits in connection with the production of magnesium. The applicants are without any rights thereto and the mere fact that they filed applications for the lands confers none.⁴ The issuance of a prospecting permit to the applicants for these lands clearly rests in the discretion of the Secretary.⁵

The motion for rehearing is

Denied.

AVAILABILITY OF APPROPRIATED FUNDS FOR PAYMENTS UNDER PREEXISTING CONTRACTS

Opinion, July 15, 1942

APPROPRIATIONS—CONTRACTS—FUNDS AVAILABLE FOR PAYMENT.

A contract made in one fiscal year is a proper basis for payments out of funds appropriated for the following fiscal year (1) when it was entered into after the appropriation act for the second year was passed but before that year began; (2) when it contains an option to renew which, after appropriate inquiry to see that the price has not fallen out of line with competitors' prices, has been exercised; or (3) when, although not containing an option to renew, it appears that it will be more advantageous to the Government to continue under the old contract than to enter into a new one.

COHEN, Acting Solicitor:

The opinion of the Solicitor "on the availability of funds from a new appropriation for continuing prospecting work under an old contract, after the beginning of a new fiscal year" has been requested by the Director of the Bureau of Mines. The question is, I believe, confined to problems arising out of annual appropriation acts; I shall restrict my answer accordingly. Likewise, I understand the question to be asked without particular reference to the provision of the First War Powers Act of 1941¹ that—

The President may authorize any department or agency of the Government exercising functions in connection with the prosecution of the war effort, in

⁴ *Enlow v. Shaw*, 50 L. D. 339, 340 (1924); *Walter Kearin & Legatees of Peter Fern*, 53 I. D. 699, 702 (1932); *McNeil v. Marias*, 54 I. D. 333, 335 (1933); *D. E. Jenkins*, 55 I. D. 13, 14 (1934).

⁵ *United States ex rel. McLennan v. Wilbur*, 283 U. S. 414 (1931); *Dunn v. Ickes*, 115 F. (2d) 36, 72 App. D. C. 325 (1940); *Wann v. Ickes*, 92 F. (2d) 215, 217-18, 67 App. D. C. 291, 293-94 (1937); *United States ex rel. Roughton v. Ickes*, 101 F. (2d) 248, 69 App. D. C. 324 (1938).

¹ Act of December 18, 1941, ch. 593, tit. 2, sec. 201 (55 Stat. 839, 50 U. S. C. App. sec. 611).

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accordance with regulations prescribed by the President for the protection of the interests of the Government, to enter into contracts and into amendments or modifications of contracts heretofore or hereafter made * * * without regard to the provisions of law relating to the making, performance, amendment, or modification of contracts whenever he deems such action would facilitate the prosecution of the war. * * *

Resort to this provision and to the Executive order delegating to the Secretary of the Interior² the same authority that the President had already delegated to the War and Navy Departments³ under it may, however, in the case of contracts relating to the prosecution of the war, be useful to resolve any doubts that remain after the discussion that follows.

There are two statutes which must be reckoned with in answering the question that has been put to this office:

No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment. * * *

No executive department * * * shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year, or involve the Government in any contract or other obligation for the future payment of money in excess of such appropriations unless such contract or obligation is authorized by law.⁴

As far as I am aware, it has never been argued that the provision of the statutes just cited that "No executive department * * * shall expend, in any one fiscal year, any sum in excess of appropriations made by Congress for that fiscal year" requires, if a balance left over from the preceding year is used, that expenditures from the current appropriation be cut down *pro tanto*. As Attorney General Akerman pointed out in an opinion shortly after this statute was enacted,⁵ a narrow construction of this sort would make useless the provision, enacted at the same time, that unexpended balances from any fiscal year may thereafter "be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year."⁶ In view of this, it is safe to say that the provision under discussion is not a restriction on the spending of what has already been appropriated, but is rather a restriction against spending more than has been appropriated either currently or in preceding years.

² Executive Order No. 9055, February 10, 1942, 7 F. R. 964.

³ Executive Order No. 9001, December 27, 1941, 6 F. R. 6787.

⁴ Revised Statutes, sec. 3732 (41 U. S. C. sec. 11).

⁵ Revised Statutes, sec. 3679, as amended by the act of February 27, 1906, ch. 510 (34 Stat. 27, 49, 31 U. S. C. sec. 665).

⁶ Attorney General to the Secretary of War, 13 Op. Atty. Gen. 288, 291 (1870).

⁷ Revised Statutes, sec. 3690 (31 U. S. C. sec. 712).

The purpose of the other portions of these enactments, it is quite clear, is also to prevent the executive officers of the Government from outrunning their budgets and to keep them from committing the Government to future expenditures over which Congress could have no effective control. The Attorney General's advice, several times given, against commitments outrunning the fiscal year in the absence of congressional permission to make such commitments is in accord with this understanding of the statutes.⁸ So, too, are the holdings of the Supreme Court that contracts made to run beyond the fiscal year are unenforceable against the United States after the year in which they are made if that year's appropriation has been exhausted.⁹

The Comptroller General has phrased his construction of these statutes very broadly:¹⁰

The general rule relative to obligating fiscal year appropriations by contracts is that the contract must be made within the fiscal year the appropriation for which is sought to be charged, that the signing of the contract must be within the fiscal year, and that the subject matter must concern a need arising within that fiscal year.

In spite of this broad statement, however, it is clear from other opinions of the Comptroller General and from various decisions of the courts that payments in a later fiscal year out of the appropriations for that year on contracts entered into before the beginning of that year are not forbidden under all circumstances. One circumstance under which such payments can properly be made arises when a contract is entered into after an appropriation act has been passed but before the appropriation is available.¹¹ For instance, if a departmental appropriation act for the next fiscal year were approved by the President on June 1, a contract could properly be made between then and June 30 for the following fiscal year and payments could be made after July 1 accordingly. The effect of this is that, for a time at least, a choice can sometimes be had between paying out of the appropriation available at the time the contract was entered into and paying out of the later appropriation.

Similarly, the Comptroller General has approved the making of contracts containing an option to renew or permitting the filing of

⁸ Acting Attorney General to the Secretary of the Interior, 27 Op. Atty. Gen. 584 (1909); Attorney General to the President, 30 Op. Atty. Gen. 527 (1916).

⁹ *Goodyear Tire and Rubber Co. v. United States*, 276 U. S. 287 (1928); *Letter v. United States*, 271 U. S. 204 (1926).

¹⁰ Acting Comptroller General Elliott to the Executive Officer, The National Archives (A-77913), 16 Comp. Gen. 37, 38 (1936).

¹¹ Comptroller General McCarl to the Secretary of the Interior, 2 Comp. Gen. 739 (1923); Acting Comptroller General Elliott to the Administrator, Rural Electrification Administration (A-85980), 16 Comp. Gen. 1007 (1937); Comptroller General Warren to the Postmaster General (B-17476), 20 Comp. Gen. 868 (1941).

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repeat orders.¹² He has emphasized that since there is no obligation on the Government to exercise the option or to give a repeat order such contracts as these are not unlawful. He has suggested, however, that, if they run for any considerable time beyond the fiscal year during which they were originally entered into, it is incumbent on the Government agency entering into the contract to see that the prices called for in the contract have not, at the time of exercising the option, fallen out of line with competitors' prices to the Government's detriment.¹³ No doubt there will be occasions on which Bureau of Mines prospecting contracts can be so framed as to come within this class.

A more difficult question is whether a contract entered into in one fiscal year, before the approval of the appropriation act for the next fiscal year and without in terms containing an option to renew, can properly be charged to the appropriation for a second fiscal year as far as work done during that fiscal year is concerned. The Supreme Court, as I have pointed out before, has held that such a contract, however worded, does not obligate the Government beyond the fiscal year in which it was entered into.¹⁴ This does not mean, however, that the contractor cannot be bound if the Government elects to continue the contract. Though, so far as I am aware, the courts have never been asked to pass on this question directly, they have on various occasions indicated that this is the conclusion that they will reach.¹⁵ The result is that a contract for more than a year amounts to a contract till the end of the fiscal year with an option to renew. The Court of Claims, in what is perhaps the leading case on this subject, put the matter this way:¹⁶

¹² Comptroller General McCarl to the Secretary of the Interior (A-27844), 9 Comp. Gen. 6 (1929); Acting Comptroller General Elliott to the Chairman, Civil Aeronautics Authority (B-10272), 19 Comp. Gen. 980 (1940); Comptroller General Warren to the President, Civil Service Commission (B-15566), 20 Comp. Gen. 572 (1941).

¹³ See Comptroller General Warren to the President, Civil Service Commission, *supra*, note 12 at 573: "You are advised * * * that the option to renew * * * should be exercised only after it shall have been ascertained both that funds will be available to continue the work for that fiscal year, and that the acceptance of the contract for the succeeding fiscal year will be in the interest of the Government, as evidenced by competitive bids for the same service secured within a reasonable time prior thereto."

¹⁴ *Supra*, note 9.

¹⁵ See also Attorney General to the Secretary of the Navy, 38 Op. Atty. Gen. 328, 331 (1935): "The failure of the Government to comply with statutory requirements relative to public contracts enacted for the sole protection of the Government does not render such contracts void, but only voidable at the Government's option, and only the Government can take advantage of such failure." A like result has been reached by the Supreme Court in other cases dealing with the statutory requirement that Government contracts be put in writing and filed. With *United States v. New York & Porto Rico Steamship Co.*, 239 U. S. 88 (1915), compare *Clark v. United States*, 95 U. S. 539 (1877); *Erie Coal & Coke Corp. v. United States*, 266 U. S. 518 (1925).

¹⁶ *McCollum v. United States*, 17 Ct. Cl. 92, 104 (1881). See also *Smoot v. United States*, 38 Ct. Cl. 418, 427 (1903); *Lester v. United States*, 59 Ct. Cl. 907, 909 (1924), *aff'd* 271 U. S. 204 (1926).

So far * * * as the contract relates to that [i. e., the then current] fiscal year it was lawfully made and was binding on the defendants. Beyond that its only force was to give the Postmaster-General each fiscal year thereafter, when a new appropriation should be made, the option to adopt and ratify the contract for another year. This he might do by express notice to that effect, or by entry and occupation of the premises after the commencement of the year. * * *

In other words, a lease for a term of years founded on an annual appropriation is binding on the government only until the end of that year, with a future option from year to year till the end of the lease. Such is the effect of the contract and statutes taken together, to which the contracting parties must be held to have agreed.

If the option, express or implied, is exercised by the Government it follows that payments not only can but must be made on such a contract. This result was reached by the Court of Claims in a case in which the Government, having continued to occupy premises rented from the plaintiff after the expiration of a fiscal year, was held liable for a full year's rent instead of merely for rent for that portion of the year during which it actually occupied the premises.¹⁷ This being so, it seems to me equally clear that there is no impediment to continuing payments voluntarily on an earlier year's contract even though they have to come out of a later year's appropriation. The Attorney General some years ago so advised the Secretary of War.¹⁸ This conclusion, I may point out, is subject to the qualification that inquiry should be made, as the Comptroller General requires in the case of contracts containing an express option, to see that continuance of payments serves the interests of the Government. If it is found that it does so—i. e., if it is found that a new bargain would be more costly to the Government—continuance of payments on an old contract not only is proper for the reasons I have already stated but is in accord with the policy behind the rule that Government officers may not compromise the Government's rights to its detriment.¹⁹

¹⁷ *Smoot v. United States*, *supra*, note 16. Cf. *Goodyear Tire & Rubber Co. v. United States*, *supra*, note 9, on the holdover point.

¹⁸ 15 Op. Atty. Gen. 235, 244 (1877). Compare, however, the result where the original contract is made under an act appropriating a specific amount for a specific purpose, Attorney General to the Secretary of War, 21 Op. Atty. Gen. 244 (1895); Assistant Comptroller Bowers to the Secretary of the Navy, 3 Comp. Treas. 437 (1897).

¹⁹ *Bausch and Lomb Optical Co. v. United States*, 78 Ct. Cl. 584, 607 (1934), *cert. denied*, 292 U. S. 645 (1934): "Agents and officers of the Government have no authority to give away the money or property of the United States, either directly or under the guise of a contract that obligates the Government to pay a claim not otherwise enforceable against it." Accord: *United States v. American Sales Corp.*, 27 F. (2d) 389 (S. D. Tex. 1928), *aff'd*, 32 F. (2d) 141 (C. C. A. 5, 1929); *cert. denied*, 280 U. S. 574 (1929); Comptroller General McCarl to the Secretary of the Interior (A-59030), 14 Comp. Gen. 468 (1934); Comptroller General McCarl to the Administrator, Federal Emergency Administration of Public Works (A-63089), 15 Comp. Gen. 25 (1935); Comptroller General Brown to Secretary of Agriculture (B-214), 19 Comp. Gen. 48 (1939). See also *J. J. Preis and Co. v. United States*, 58 Ct. Cl. 81, 86 (1923); *Vulcanite Portland Cement Co. v. United States*, 74 Ct. Cl. 692, 705 (1932).

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I should add that nothing that I have said is to be taken as indicating that it is proper for a Government officer deliberately to make a bargain which attempts to bind the Government beyond the appropriation for the fiscal year in which it is made.²⁰ Quite apart from the fact that Congress has prescribed a penalty for officers and employees who enter into such contracts,²¹ it would be unfair for a Government officer to mislead a private party into believing that he has an enforceable bargain when he has not. What I have said is directed only toward the propriety of making payments on such a contract innocently entered into or on a contract which, at the time it was made, could have been expected to be completed before the end of the fiscal year but, for one reason or another, was not.

A contract made in one fiscal year, to summarize what I have said, is a proper basis for payments out of funds appropriated for the following fiscal year (1) when it was entered into after the appropriation act for the second year was passed but before that year began; (2) when it contains an option to renew which, after appropriate inquiry to see that the price has not fallen out of line with competitors' prices, has been exercised; or (3) when, although not containing an option to renew, it appears that it will be more advantageous to the Government to continue under the old contract than to enter into a new one.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

RIGHTS-OF-WAY FOR DITCHES AND CANALS

Opinion, July 16, 1942

RIGHTS-OF-WAY—SECTION 2339 OF THE REVISED STATUTES—SUBSEQUENT RIGHT-OF-WAY ACTS—TRESPASS.

Status of right-of-way clause of section 2339 of the Revised Statutes. *Held*,

(1) the right-of-way clause of section 2339, Revised Statutes, has been superseded by subsequent right-of-way statutes; (2) persons constructing ditches, canals, or reservoirs upon the public lands without compliance with the appropriate departmental right-of-way regulations are in trespass.

COHEN, *Acting Solicitor*:

I have been asked for an opinion as to whether section 2339 of the Revised Statutes (sec. 9, act of July 26, 1866; 14 Stat. 253, 30

²⁰ Cf. Comptroller General McCarl to the Secretary of the Interior, *supra*, note 12.

²¹ Revised Statutes, sec. 3679, as amended by the act of February 27, 1906, ch. 510 (34 Stat. 27, 48, 31 U. S. C. sec. 665): "Any person violating any provision of this section shall be summarily removed from office and may also be punished by a fine of not less than one hundred dollars or by imprisonment for not less than one month."

U. S. C. sec. 51, 43 U. S. C. sec. 661) has been superseded by later laws in so far as it acknowledges and confirms rights-of-way for "the construction of ditches and canals."

The pertinent provisions of section 2339 read as follows:

"That whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes, have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of courts, the possessors and owners of such vested rights shall be maintained and protected in the same; *and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed:* * * * [Italics supplied.]

It should be borne in mind at the outset that the only question here presented is whether the underlined right-of-way clause of section 2339 has been superseded by subsequent legislation. That water rights may still be acquired under State laws as provided in the fore part of section 2339 is not open to question. *California Oregon Power Co. v. Beaver Portland Cement Co.*, 295 U. S. 142, 155. But water rights thus acquired do not carry with them, as necessary incidents, rights-of-way over public lands. *Utah Power & Light Co. v. United States*, 243 U. S. 389, 410, 411.

Subsequent to the enactment of section 2339 and prior to 1901 several statutes were passed covering rights-of-way for the construction of ditches, canals and reservoirs for specified uses. The first was the act of March 3, 1891 (secs. 18-21, 26 Stat. 1095, 1101, 1102, 43 U. S. C. secs. 946-949). Section 18 granted a right-of-way through public lands to any canal or ditch company formed for the purpose of *irrigation* upon its filing a copy of its articles of incorporation with the Secretary of the Interior. Section 19 required canal and ditch companies to file a map of their canal, ditch, or reservoir system for the approval of the Secretary of the Interior. Section 20 made the provisions of the act applicable to all canals, ditches or reservoirs whether constructed before or after the act and whether constructed by corporations, individuals, or associations of individuals. Sections 18 to 21 of the 1891 act were amended by section 2 of the act of May 11, 1898 (30 Stat. 404, 43 U. S. C. sec. 951), which provides that rights-of-way granted for irrigation purposes "may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation."

January 21, 1895 (28 Stat. 635, 43 U. S. C. sec. 956), Congress passed an act authorizing the Secretary of the Interior "to permit the use," under regulations to be fixed by him, of rights-of-way through public lands not within the limits of parks, forests and reservations

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for tramroads, canals or reservoirs by citizens or any association of citizens "engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber." In passing this permissive-use act of 1895, Congress must have intended that miners and lumbermen would not thereafter have the unrestricted right given by section 2339 to go upon public lands and acquire a right-of-way by merely constructing a ditch or a canal.

By the act of May 14, 1896 (29 Stat. 120, 43 U. S. C. sec. 957), Congress amended the act of January 21, 1895, by authorizing the Secretary of the Interior "*to permit the use*" under regulations to be fixed by him of rights-of-way upon the public lands and forest reservations by citizens or associations of citizens "for the purposes of generating, manufacturing, or distributing electric power." In passing this act Congress must have intended to take rights-of-way for power projects from under section 2339. The Supreme Court has so held in *Utah Power & Light Co. v. United States*, 243 U. S. 389, 410, 411.

Congress again amended the act of January 21, 1895, by passing the act of May 11, 1898 (30 Stat. 404, 43 U. S. C. sec. 956), which authorizes the Secretary of the Interior "*to permit the use,*" under regulations to be fixed by him, of rights-of-way upon public lands not within any park, forest, military or Indian reservation for canals or reservoirs by any citizen or association of citizens "for the purposes of furnishing water for domestic, public, and other beneficial uses." Thus it is seen that the permissive-use act of 1895, which applied originally only to miners and lumbermen, was expanded by amendment in 1896 to include rights-of-way for the manufacture and distribution of electric power, and was further expanded by the 1898 amendment to include rights-of-way for furnishing water for domestic, public, and other beneficial uses.

Then came the act of February 15, 1901 (31 Stat. 790, 43 U. S. C. sec. 959), which was undoubtedly intended to cover rights-of-way for canals, ditches, and reservoirs for *all purposes* and to replace the previous acts which only partially cover such rights-of-way. In its legislative history the need and purpose of the 1901 act were stated to be as follows:

Sections 2239 [2339] and 2340 of the Revised Statutes, the act of March 3, 1891 (26 Stat. L., 1095, secs. 18-21), * * * the act of May 11, 1898 (30 Stat. L., 404), relating to rights of way for ditches, canals, and reservoirs over the public lands and reservations of the United States, are so confused and so fragmentary in their nature that the Department is greatly embarrassed in their administration. For instance, the act of March 3, 1891 (26 Stat. L., 1095), grants rights of way for ditches, canals, and reservoirs used for the purposes of irrigation, and the act of May 11, 1898 (30 Stat. L., 404), in its

second section authorizes the use of these rights of way for other specified purposes. The later act, however, instead of granting rights of way for these newly specified purposes, merely enlarges and extends the uses to which rights of way granted for the purposes of irrigation may be applied. Thus a right of way cannot be obtained where it is intended to use the water exclusively as a means of creating power to run an electric or manufacturing plant or in hydraulic or placer mining, although when a right of way is once obtained for irrigation purposes it may also be used for these other purposes in a subsidiary way.

The several acts relating to this subject should be brought together and harmonized in a new act, the terms of which should be *broad and comprehensive enough to afford the widest possible use, for all beneficial purposes, of the waters on the public lands and reservations of the United States*, so long as the same is consistent with the *preservation of the public interests* and the attainment of the purposes for which the various reservations are established.¹ [Italics supplied.]

The provisions of the 1901 act (31 Stat. 790, 43 U. S. C. sec. 959), are clearly comprehensive enough to carry out these purposes. It provides:

That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, *to permit* the use of rights of way through the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks, California, for electrical plants, poles, and lines for the generation and distribution of electrical power, and for telephone and telegraph purposes, and for canals, ditches, pipes and pipe lines, flumes, tunnels, or other water conduits, and for water plants, dams, and reservoirs used to promote irrigation or mining or quarrying, or the manufacturing or cutting of timber or lumber, or the supplying of water for domestic, public, *or any other beneficial uses* to the extent of the ground occupied by such canals, ditches, flumes, tunnels, reservoirs, or other water conduits or water plants, or electrical or other works permitted hereunder, and not to exceed fifty feet on each side of the marginal limits thereof, or not to exceed fifty feet on each side of the center line of such pipes and pipe lines, electrical, telegraph, and telephone lines and poles, by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named. [Italics supplied.] 31 Stat. 790.

But the 1901 act promptly received an administrative construction which I should have thought, as an original question of statutory interpretation, to have been not only illogical but in certain respects unwarranted. In departmental regulations issued July 8, 1901 (31 L. D. 13, *cf.* present regulations, 43 CFR 244.32), the act is construed as follows:

This act, in general terms, authorizes the Secretary of the Interior, under regulations to be fixed by him, to grant permission to use rights of way through

¹ Annual report of the Secretary of the Interior, 1899, pp. 6-7, adopted by H. Rept. 1850, 56th Cong., 1st sess.

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the public lands, forest and other reservations of the United States, and the Yosemite, Sequoia, and General Grant national parks in California, for every purpose contemplated by acts of January 21, 1895 (28 Stat., 635), May 14, 1896 (29 Stat., 120), and section 1 of the act of May 11, 1898 (30 Stat., 404), and for other purposes additional thereto, * * *

Although this act does not expressly repeal any provision of law relating to the granting of permission to use rights of way, contained in the acts referred to, yet, considering the general scope and purpose of the act, and Congress having * * * embodied therein the main features of the former acts relative to the granting of a mere permission or license for such use, it is evident that, for purposes of administration, the later act should control in so far as the same pertains to the granting of permission to use rights of way for purposes therein specified. Accordingly all applications for *permission* to use rights of way for the purposes specified in this act must be submitted thereunder. Where, however, it is sought to acquire a right of way for the main purpose of irrigation and for public or other purposes as subsidiary thereto, as contemplated by sections 18 to 21 of the act of March 3, 1891 (26 Stat. 1095), and section 2 of the act of May 11, 1898, *supra*, the application must be submitted in accordance with the then-existing regulations issued under said acts.

The quoted regulations do not specifically mention the effect of the 1901 act on the right-of-way clause of section 2339, but they provide that applications for rights-of-way for every purpose covered by the prior permissive-use acts must be submitted under the 1901 act and that rights-of-way for irrigation purposes and purposes subsidiary thereto must be submitted under the regulations issued pursuant to the 1891 act, as amended. This interpretation of the effect of the 1901 act was probably based on the assumption that the right-of-way clause of section 2339 had been superseded by the several subsequent right-of-way acts which were harmonized and consolidated by the 1901 act. The reasoning relied upon by the Department to arrive at the conclusion that the 1891 act, as amended, had not also been superseded by the 1901 act, is not disclosed. However, the Department has adhered to substantially the same regulations since 1901, a period of 40 years. In answer to inquiries with respect to the acquisition of rights-of-way for ditches, canals and reservoirs, it always designates a statute enacted subsequent to section 2339 as covering the proposed use and states unequivocally that the statute and the regulations thereunder must be complied with before any right-of-way can be acquired.

On the other hand, certain departmental memoranda and letters have been written from time to time which seem to hold that rights-of-way for the construction of ditches, canals and reservoirs may still be acquired for any purpose, except perhaps for the primary purpose of generating and distributing electric power, under the right-of-way clause of section 2339 and without complying with

subsequent statutes or the regulations thereunder covering the same subject matter. See, for example, the First Assistant Secretary's letter to the Attorney General dated March 11, 1940, and the letter of the Counsel at Large to the Executive Officer of the Alaska Game Commission dated August 20, 1940.

The inconsistency between these memoranda and letters and the position taken by the Department in its promulgation and administration of right-of-way regulations covering canals, ditches and reservoirs cannot be reconciled. It is essential, in the light of questions now arising in connection with rights-of-way, that this inconsistency be resolved one way or the other.

The leading case on the subject is *Utah Power & Light Co. v. United States*, 243 U. S. 389 (1917). The weight of authority prior to that case was to the effect that the right-of-way clause of section 2339 had not been superseded and that subsequent right-of-way acts were *in pari materia*. *United States v. Utah Power & Light Co.*, 208 Fed. 821, 823 (1913). And since the Supreme Court's decision in 1917 it appears to have been generally assumed, without much thought or consideration, that the *Utah Power & Light* case applied only to power projects. See Annotations to section 661 of title 43 of the United States Code, Annotated. I have not found a case, however, which has fully considered and decided, in the light of the Supreme Court's decision in that case, the question of whether or not the right-of-way clause of section 2339 has been superseded with respect to rights-of-way for projects other than electric power projects.

In the *Utah Power & Light* case the company attempted to rely upon section 2339, as supplemented by section 2340,² to support its claim to rights-of-way for dams, reservoirs, etc., used for the purpose of generating electric power. The Government lands upon which the dams and reservoirs were constructed were within a national forest reserve. Part of the company's works was constructed before and part after the reservation was created, but all were constructed after 1896 and nearly all after 1901. The Government contended, of course, that either the act of 1896, covering rights-of-way for power purposes, or the act of 1901, covering rights-of-way for all beneficial uses, or both, had superseded the right-of-way clause of section 2339. The Supreme Court upheld the Government's contentions, ruling as follows (243 U. S. 389, 405, 406, 407, 410, 411)

² "All patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the preceding section." Rev. Stat., sec. 2340.

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The next position taken by the defendants is that their claims are amply sustained by secs. 2339 and 2340 of the Revised Statutes, originally enacted in 1866 and 1870. By them the right of way over the public lands was granted for ditches, canals and reservoirs used in diverting, storing and carrying water for "mining, agricultural, manufacturing and other purposes." The extent of the right of way in point of width or area was not stated and the grant was noticeably free from conditions. No application to an administrative officer was contemplated, no consent or approval by such an officer was required, and no direction was given for noting the right of way upon any record. Obviously this legislation was primitive. At that time works for generating and distributing electric power were unknown, and so were not in the mind of Congress. Afterwards when they came into use it was found that this legislation was at best poorly adapted to their needs. It was limited to ditches, canals and reservoirs, and did not cover power houses, transmission lines or the necessary subsidiary structures. In that situation Congress passed the Act of May 14, 1896, c. 179, 29 Stat. 120, which related exclusively to rights of way for electric power purposes, * * *

* * * * *

We regard it as plain that this act superseded secs. 2339 and 2340 in so far as they were applicable to such rights of way. It dealt specifically with that subject, covered it fully, embodied some new provisions and evidently was designed to be complete in itself. That it contained no express mention of ditches, canals and reservoirs is of no significance, for it was similarly silent respecting power houses, transmission lines and subsidiary structures. What was done was to provide for all in a general way without naming any of them.

As the works in question were constructed after secs. 2339 and 2340 were thus superseded, the defendants' claims receive no support from those sections.

* * * * *

In the oral and written arguments counsel have given much attention to the Act of February 15, 1901, c. 372, 31 Stat. 790. On the part of the Government it is insisted that the comprehensive terms of the act and its legislative history conclusively show that it was adopted as a complete revision of the confused and fragmentary right-of-way provisions found in several earlier enactments, including those already noticed, but this need not be considered or decided now beyond observing that the act obviously superseded and took the place of the law of May 14, 1896, *supra*. The act empowers the Secretary of the Interior, "under general regulations to be fixed by him," to permit the use of rights of way through the *public lands*, forest reservations, etc., for any one or more of several purposes, including the generation and distribution of electric power, *carefully defines the extent of such rights of way and embodies provisions not found in any of the earlier enactments.* * * *

Much is said in the briefs about several congressional enactments providing or recognizing that rights to the use of water in streams running through the public lands and forest reservations may be acquired in accordance with local laws, but these enactments do not require particular mention, *for this is not a controversy over water-rights but over rights of way through lands of the United States, which is a different matter and is so treated in the right-of-way acts before mentioned.* [Italics supplied.]

Obviously, the Court limited its decision to electric power purposes because rights-of-way for such purposes were the only ones at issue.

But the reasoning of the Court is persuasive that the right-of-way clause of section 2339, which the Court held had been superseded in so far as ditches, canals and reservoirs for electric power were concerned, must also be held to have been superseded as to rights-of-way for canals, ditches and reservoirs for all purposes.

Let us examine, in the light of the Court's decision, the several right-of-way acts which were intended to be brought together and harmonized by the 1901 act. First, let us consider the permissive-use act of 1895 and its amendments. The act of January 21, 1895 (28 Stat. 635, 43 U. S. C. sec. 956), provides:

That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States, not within the limits of any park, forest, military or Indian reservation, for tramroads, canals or reservoirs to the extent of the ground occupied by the water of the canals and reservoirs and fifty feet on each side of the marginal limits thereof; or fifty feet on each side of the center line of the tramroad, by any citizen or any association of citizens of the United States engaged in the business of mining or quarrying or of cutting timber and manufacturing lumber. [28 Stat. 635.]

The act of May 14, 1896 (29 Stat. 120, 43 U. S. C. sec. 957), which amended the 1895 act and which was held by the Supreme Court to have superseded the right-of-way clause of section 2339, and which was in turn held by the Court to have been superseded by the act of 1901, provides:

That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way to the extent of twenty-five feet, together with the use of necessary ground, not exceeding forty acres, upon the public lands and forest reservations of the United States, by any citizen or association of citizens of the United States, for the purposes of generating, manufacturing, or distributing electric power.

Section 1 of the act of May 11, 1898 (30 Stat. 404, 43 U. S. C. sec. 956), which also amended the 1895 act, provides:

That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of right of way upon the public lands of the United States, not within limits of any park, forest, military, or Indian reservations, for tramways, canals, or reservoirs, to the extent of the ground occupied by the water of the canals and reservoirs, and fifty feet on each side of the marginal limits thereof, or fifty feet on each side of the center line of the tramroad, by any citizen or association of citizens of the United States, for the purposes of furnishing water for domestic, public, and other beneficial uses. [30 Stat. 404.]

In so far as their effect upon the right-of-way provisions of section 2339 is concerned, the analogy between these three acts appears to be complete. All are subsequent in time to section 2339; all embody

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new provisions and appear to be designed to cover fully rights-of-way for the construction of projects for the specific purposes mentioned therein; all authorize a permissive use only under regulations to be prescribed by the Secretary of the Interior; and consequently all squarely and equally conflict with section 2339, which acknowledges and confirms a vested right in rights-of-way acquired thereunder. It follows that each respectively should be held to have superseded section 2339. That all three acts have in turn been superseded by the 1901 act does not appear, in the light of the *Utah Power and Light* case, open to question.

The consequences of a contrary construction that section 2339 has not been superseded are somewhat startling because by the terms of that section a right-of-way vests upon the acquisition of a water right from State authorities and the construction of a ditch, canal, or reservoir (*United States v. Rickey Land etc. Co.*, 164 Fed. 496), and such vested rights-of-way are not subject to departmental regulation or rental charge. Cf. departmental decision in *Stanolind Oil and Gas Company*, A. 22537, dated July 29, 1940 (unreported).^{*} Consequently, it would be unnecessary and unwise for a water right owner to make application under the 1901 act for a permit to use a right-of-way which would immediately vest upon the construction of his ditch, canal, or reservoir. It is true that under the 1901 act he would probably get the use of a wider right-of-way, but this additional privilege would by no means compensate him for relinquishing his right to an easement for a permitted use inasmuch as such use is subject to rental charge of \$5 per mile and other governmental regulations as well as being subject to revocation for reasonable cause. In brief, it is obvious that the right-of-way provisions of the two statutes are too conflicting to stand together. If the right-of-way clause of section 2339 has not been superseded and is still applicable to rights-of-way of this nature, the 1901 act must be held to be inapplicable and the regulations thereunder unenforceable. But a holding to this effect is hardly permissible because under accepted standards of statutory construction the earlier general act does not prevail over the subsequent specific act covering the same subject matter.

This leaves for consideration the more complex problem presented in connection with the act of March 3, 1891 (secs. 18-21), which, as amended by section 2 of the act of May 11, 1898, provides for the granting of right-of-way easements³ for the construction of ditches, canals, and reservoirs for purposes of irrigation and purposes sub-

^{*} Decision referred to may be found in the files of the Solicitor's Office.

³ Cf. *Great Northern Railway Co. v. United States*, 315 U. S. 262.

sidary thereto. In the early cases decided prior to the Supreme Court's decision in the *Utah Power and Light Co.* case it appears that it had been held, due to policy considerations, that the 1891 act, as amended, had not superseded the right-of-way clause of section 2339.

Do these subsequent statutes furnish additional or cumulative rights or were they intended to entirely displace section 9? [R. S. 2339.] Some light is thrown on this question by the act of March 3, 1891, granting rights of way for canals, ditches, and reservoir purposes for irrigation, subject to the filing of plats with the Secretary of the Interior and his approval thereof, and to a provision for forfeiture if the ditch or canal be not completed within five years. Was section 9 repealed by this act with respect to water rights for irrigation? This statute grants some rights additional to those granted by section 9, and is subject to burdensome conditions—to the small irrigator conditions so burdensome as in some cases to preclude the exercise of the right. If there was any class the government might be presumed to specially favor, it was the irrigator of land, and yet, if this was a repeal, he was singled out to be discriminated against. So that at an early date the Land Department of the government held that this statute was cumulative and did not repeal section 9 as to ditches for irrigation. *Cache Valley Canal Co.*, 16 Land Dec. Dept. Int. 192, 196; *Silver Lake, etc., Co. v. City of Los Angeles*, 37 Land Dec. Dept. Int. 152; *McMillan Reservoir Site*, 37 Land Dec. Dept. Int. 6; *Lincoln County, etc., Land Co. v. Big Sandy Reservoir Co.*, 32 Land Dec. Dept. Int. 463. And so the courts generally decided. *Cottonwood v. Thom*, 39 Mont. 115, 101 Pac. 825, 104 Pac. 281; *Rasmussen v. Blust*, 35 Neb. 198, 122 N. W. 862, 133 Am. St. Rep. 650; *United States v. Lee*, 15 N. M. 382, 110 Pac. 607; *United States v. Conrad Investment Co. (C. C.)* 156 Fed. 123. In enacting subsequent statutes respecting power plants Congress must be considered to have taken note of these holdings. Again, it did not expressly repeal section 9; again, it granted additional rights subject to specified conditions. These statutes are in *pari materia*; they are to be construed together and presumptively evidence the same intent. The weight of authority is that section 9 has not been repealed. [*United States v. Utah Power & Light Co.*, 208 Fed. 821, 823.]

On appeal to the Supreme Court, as we have already noted, the doctrine that the right-of-way clause of section 2339 had not been superseded by any of the subsequent right-of-way acts was repudiated. True, the question as to whether the 1891 act had superseded said section in so far as it applied to rights-of-way for irrigation was not before the Court. Nevertheless, under the rule laid down by the Court it would appear that the 1891 act superseded the earlier enactment as to such rights-of-way. "It dealt specifically with that subject, covered it fully, embodied some new provisions and evidently was designed to be complete in itself." *Utah Power & Light Co. v. United States*, 243 U. S. 389, 406.

Furthermore, the 1891 act is repugnant in at least two respects to the right-of-way clause of section 2339. First, the 1891 act (sec. 19) empowered the Secretary of the Interior to approve or reject

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the location of rights-of-way since right-of-way easements vested thereunder only upon the approval by him of the location maps. Under section 2339 no consent or approval by a Government official was required. Secondly, the 1891 act (sec. 20) provides for forfeiture of any section of the right-of-way not completed within five years from the date of its location. Such forfeiture would be of little significance if it were possible for the grantee to proceed thereafter with the construction of the ditch or canal under section 2339. It follows therefore that the act of 1891, as amended, superseded the right-of-way clause of section 2339 as to rights-of-way over public lands constructed after 1891 for purposes of irrigation and purposes subsidiary thereto.

The act of 1901, the provisions of which appear to cover rights-of-way for all beneficial uses of water, including irrigation, is equally repugnant to section 2339 with respect to irrigation as it is with respect to electric power. The 1901 act is also repugnant to the act of 1891 since it grants a permissive use only while the act of 1891 grants an easement. But, as heretofore observed, the Department has for a period of approximately 40 years promulgated regulations construing the 1891 act as being in full force and effect notwithstanding the repugnant provisions of the 1901 act. Moreover, the Supreme Court of New Mexico in the case of *United States v. Lee et al.*, 110 Pac. 607, adopted the Department's administrative construction as expressed in its rules and regulations and held that the 1901 act did not supersede the 1891 act. Finally, on March 4, 1917 (39 Stat. 1197, 43 U. S. C. secs. 946, 951), March 1, 1921 (41 Stat. 1194, 43 U. S. C. sec. 950), and May 28, 1926 (44 Stat. 668, 43 U. S. C. sec. 946), Congress amended the 1891 act and thereby confirmed its full force and effect throughout its existence. The language of the amendatory acts leaves no doubt with respect to this question. For example, section 2 of the amendatory act of March 4, 1917, provides:

That rights of way for ditches, canals, or reservoirs *heretofore or hereafter approved* under the provisions of sections eighteen, nineteen, twenty, and twenty-one of the Act entitled "An Act to repeal timber-culture laws, and for other purposes," approved March third, eighteen hundred and ninety-one, may be used for purposes of a public nature; and said rights of way may be used for purposes of water transportation, for domestic purposes, or for the development of power, as subsidiary to the main purpose of irrigation or drainage. [Italics supplied.]

In passing these amendments it must be presumed that Congress acted with knowledge of the administrative construction which had been placed on the 1891 act and was fully aware of the Department's

practice of approving rights-of-way for irrigation purposes under the provisions of the 1891 act notwithstanding the 1901 act. Consequently Congress has adopted this administrative construction of the 1891 act and has confirmed its full application to rights-of-way for irrigation purposes and subsidiary purposes since its passage in 1891. *Armstrong Paint & Varnish Works v. Nu-Enamel Corp.*, 305 U. S. 315, 332; *Helvering v. R. J. Reynolds Tobacco Co.*, 306 U. S. 110, 115; *Murphy Oil Co. v. Burnet*, 287 U. S. 299, 307. It follows that the 1901 act has no application to irrigation and rights-of-way for purposes of irrigation and purposes subsidiary thereto can only be acquired under the 1891 act, as amended. See 43 CFR 244.10-244.17, 244.32.

In my opinion, therefore, the right-of-way clause in section 2339 of the Revised Statutes has been entirely superseded by subsequent statutes* as follows:

1. *For purposes of irrigation and purposes subsidiary thereto.* By the act of March 3, 1891 (secs. 18-21, 26 Stat. 1095, 1101), as amended.

2. *For purposes of mining, quarrying or cutting timber and manufacturing lumber.* By the act of January 21, 1895 (28 Stat. 635). This act in turn was superseded by the 1901 act.

3. *For purposes of generating, manufacturing or distributing electric power.* By the act of May 14, 1896 (29 Stat. 120). This act in turn was superseded by the 1901 act.

4. *For purposes of furnishing water for domestic, public, and other beneficial uses.* By section 1 of the act of May 11, 1898 (30 Stat. 404). This act in turn was superseded by the 1901 act.

5. *For all purposes except irrigation and purposes subsidiary thereto.* By the act of February 15, 1901 (31 Stat. 790).

My opinion has also been requested as to whether persons who construct ditches, canals or reservoirs upon public lands without compliance with departmental regulations pertaining thereto are in trespass. It follows as a corollary from my conclusions with respect to the main question that persons or associations who construct ditches, canals or reservoirs upon public lands without permission and without compliance with the appropriate departmental right-of-way regulations are in trespass and that rights-of-way can no longer be acquired as against the United States under section 2339 of the Revised Statutes.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

* Certain statutes, for example, the act of February 1, 1905 (33 Stat. 628; 16 U. S. C. sec. 524), pertaining to rights-of-way for municipal, mining, and milling purposes within national forests, have modified these statutes to some extent but none of them has re-enacted or revised section 2339, Revised Statutes.

**DELINQUENT OPERATION AND MAINTENANCE CHARGES ON
FLATHEAD INDIAN IRRIGATION PROJECT***Opinion, July 27, 1942*

INDIAN IRRIGATION PROJECTS—OPERATION AND MAINTENANCE ASSESSMENTS—
LIENS—INTEREST PENALTY—25 CFR 100.8.

The departmental operation and maintenance assessments constitute a first lien in favor of the United States, and delinquencies in the payments of the assessments are properly subject to the interest penalty provided by 25 CFR 100.8.

COHEN, *Acting Solicitor*:

My opinion has been requested—

* * * as to whether the uncollected portions of the annual departmental assessments against lands of these Irrigation Districts [Mission, Jocko Valley and Flathead Irrigation Districts of the Flathead Indian Irrigation Project, Montana] constitute a first lien in favor of the United States against the lands for which the payments are delinquent under the provisions of the Act of March 7, 1928 (45 Stat. 210); also whether such delinquencies are subject to the penalty as provided in CFR Title 25, Section 100.8.

It is my opinion that the annual departmental assessments do constitute a first lien in favor of the United States against the lands for which the payments are delinquent and that such delinquencies are properly subject to the interest penalty provided by 25 CFR 100.8.

The United States, through the Bureau of Reclamation of the Department of the Interior, originally built the ditches, flumes and other irrigation works that supplied the Flathead Irrigation Project, Montana. In 1924, the operation and maintenance of this irrigation system were transferred to the United States Indian Irrigation Service of the Department of the Interior. This Service has been responsible for several million dollars worth of construction on this project. The Flathead Indian Irrigation Project, Montana, now operates and maintains this irrigation system. Most of the individual non-Indian landowners served by this irrigation project organized themselves into districts under the laws of Montana. These are the Mission, Jocko Valley and Flathead districts. Other non-Indian owners deal directly with the project administration which assesses their individual lands and collects the individual assessments.

The organized districts under statutory authority of the act of May 10, 1926 (44 Stat. 464), the act of March 7, 1928 (45 Stat. 210), and other legislation,¹ have made contracts with the United States

¹ Act of April 23, 1904 (33 Stat. 302); May 18, 1916 (39 Stat. 140); May 10, 1926 (44 Stat. 464, 466); January 12, 1927 (44 Stat. 945); March 7, 1928 (45 Stat. 212, 213); March 4, 1929 (45 Stat. 1574, 1639); May 14, 1930 (46 Stat. 291); February 14, 1931 (46 Stat. 1127); March 4, 1931 (46 Stat. 1567); April 22, 1932 (47 Stat. 101); February 17, 1933 (47 Stat. 830); May 9, 1935 (49 Stat. 176, 187); June 18, 1940 (54 Stat. 420); June 28, 1941 (55 Stat. 318).

of America acting by the Secretary of the Interior. Under these contracts the project administration makes up a lump sum assessment against all lands within the district for construction and for operation and maintenance charges. The assessment of the district by the project is the act of the Secretary of the Interior. The contracts between the United States and each of the above-mentioned districts provide:

Operation and maintenance charges not consolidated with construction charges as hereinabove provided for shall be paid as now provided by law and by rules made or to be made thereunder by the Secretary of the Interior. Operation and maintenance charges shall be determined and apportioned by the Secretary of the Interior, and in apportioning the same, the said Secretary, if he deems it wise, may make different charges for lands in different parts of the project * * * or for any part thereof.²

After the United States has levied the assessment against the district, the district makes up the assessments against the individual landowners and adds thereto an amount to cover the cost of the administration of the district. The contracts provide:

Each of the said Irrigation Districts promises and agrees that it will levy annual assessments against the lands within its borders, designated by the Secretary of the Interior as assessable as hereinabove provided, in such amounts that the total thereof shall not be less than the aggregate amount of the obligations due or estimated by the Secretary of the Interior or his agents to become due the United States, and from time to time as occasion may require will cause to be done whatever may be legally necessary to be done by it or its officers and agents in order to procure and insure in each year the due assessment, levy and collection of an amount sufficient to discharge all obligations of this contract, and will comply promptly with all the provisions of the laws of the State of Montana for the assessment, levy and collection of taxes necessary to carry out this contract.³

The individual assessments are collected by the county in the same way that county taxes are collected.

The assessments for operation and maintenance charges levied by the United States against these irrigation districts are made on the

² The original contracts (supplementary contracts are not cited in this opinion) between the United States and the irrigation districts are as follows:

Flathead Irrigation District contract dated May 12, 1928, approved November 24, 1928, found in Office of Indian Affairs file No. 29485-1921, part 4, Flathead file No. 377.

Mission Irrigation District contract dated March 7, 1931, approved April 21, 1931, found in Office of Indian Affairs file 29485-1921, part 9, Flathead file No. 377.

Jocko Valley Irrigation District contract dated November 13, 1934, approved February 26, 1935, found in Office of Indian Affairs file 29485-1921, part 11, Flathead file No. 377.

Citations for these contracts will hereafter be made as follows: (above quotation) Flathead contract, item 15, p. 16; Mission contract, item 19, p. 13; Jocko contract, item 26, p. 16.

³ Flathead contract, item 17, p. 17; Mission contract, item 21, p. 13; Jocko contract, item 28, p. 17.

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basis of estimates of cost determined well in advance of the irrigation season and according to the contracts must be paid in advance of each irrigation season.⁴

Some time after the irrigation season is over the project is able to determine the actual amount spent in operating and maintaining the irrigation works for that season. If this amount is greater or less than the estimate upon which the assessments were based, an adjustment is made in the assessments for the following season or perhaps the adjustment is spread over several seasons. Over a period of time an attempt is made to keep assessments for operation and maintenance approximately equal to actual costs.

There is no question but that the United States has a first lien by statute for construction, operation and maintenance costs. The act of May 10, 1926 (44 Stat. 465), provides:

* * * *Provided further*, That all construction, operation, and maintenance costs, except such construction costs on the Camas Division held and treated as a deferred obligation herein provided for, on this project shall be, and are hereby, made a first lien against all lands within the project, which lien upon any particular farm unit shall be released by the Secretary of the Interior after the total amount charged against such unit shall have been paid, and a recital of such lien shall be made in any instrument issued prior to such release by the said Secretary. The contracts executed by such district or districts shall recognize and acknowledge the existence of such lien: * * * [Italics supplied.]

The act of March 7, 1928 (45 Stat. 210), provides:

* * * *Provided further*, That the costs of irrigation projects and of operating and maintaining such projects where reimbursement thereof is required by laws shall be apportioned on a per acre basis against the lands under the respective projects and shall be collected by the Secretary of the Interior as required by such law, and any unpaid charges outstanding against such lands shall constitute a first lien thereon which shall be recited in any patent or instrument issued for such lands. [Italics supplied.]

This statutory lien is further established by the provisions of the contracts between the United States and the irrigation districts which provide:

* * * All construction, operation and maintenance costs, except such construction costs on the Camas Division held and treated as a deferred obligation herein provided for, on said project, shall be and are hereby made a first lien against all lands within the project, which lien upon any particular farm unit shall be released by the Secretary of the Interior after the total amount charged against such unit shall have been paid, and a recital of such lien shall be made in any instrument issued prior to such release by the said Secre-

⁴ Flathead contract, item 13, p. 13; Mission contract, item 15, p. 10; Jocko contract, item 19, p. 11.

tary. The said districts do hereby recognize and acknowledge the existence of such lien * * * *.

The contracts also provide:

The United States retains in full force all obligations and liens of, against or upon all and any lands in said project whether contained in any of said Districts or not, and of and against the owners thereof for construction and operation and maintenance *charges*, which it has by virtue of any and all laws, contracts or agreements heretofore made, or otherwise, and retains and shall have the full right to enforce the same by shutting off water or otherwise as it shall see fit.⁵

Although it is clear that the United States has both a statutory and contract first lien for construction, operation and maintenance costs, the problem arises that if the United States attempts to foreclose its lien and collect its assessments, it is met with the contention that the assessments for operation and maintenance are not and cannot be the basis of a lien since they are made up in advance of the irrigation season and are estimates of cost. The real question to be determined, however, in this opinion is whether the basis of the lien for operation and maintenance charges is the assessment made by the Secretary of the Interior pursuant to authority vested in him by Congress, which is an estimate of cost made annually in advance of each irrigation season, or whether the actual expenditures for such season which can only be determined definitely after the irrigation season is over are the true costs and therefore the basis of the lien of the United States.

The annual order of the Secretary of the Interior fixing the assessment is the basis of the lien. The assessment of necessity is based on estimates of the cost of the operation and maintenance of the project for a particular year. The cost may include inventory, depreciation of machinery and equipment, and expenditure of money appropriated by Congress or authorized by Congress from collections from the water users. The assessment representing cost of operation and maintenance is not based solely on collections as indicated by the districts. In fact the Secretary's estimates are not dissimilar to the sums making up the county and State tax rolls. Where a county or State failed to collect all of the assessed taxes, so that their budgets could not be carried out, it would hardly be contended that the taxes were valid liens on the property taxed only to the extent of the actual expenditures by the county and State.

⁵ Flathead contract, item 14, p. 14; Mission contract, item 16, p. 11; Jocko contract, item 20, p. 12.

⁶ Flathead contract, item 8, p. 7; Mission contract, item 10, p. 8; Jocko contract, item 14, p. 9.

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In addition to the foregoing, the contracts between the United States and the districts provide:

Each of the said Irrigation Districts promises and agrees that it will levy annual assessments * * * in such amounts that the total thereof shall not be less than the aggregate amount of the obligations due *or estimated* by the Secretary of the Interior or his agents to become due the United States * * *. [Italics supplied.]

The contracts further provide:

Operation and maintenance charges not consolidated with construction charges as hereinabove provided for shall be paid as now provided by law and by rules made or to be made thereunder by the Secretary of the Interior * * *.

Although neither the statutes nor the contracts define "cost" the contracts clearly contemplate following the established practice and existing rules under which the amount levied as an assessment is to be estimated and paid for in advance of the irrigation season. The district therefore accepted this practice. The contracts make no provision for any readjustment on the basis of expenditures. In fact, in one provision of the contracts noted on pages 43 and 44, above, the term *charges* is used instead of *costs*, as though the words were interchangeable.

The expenditures by the project for any fiscal year are limited by law to actual collections. The Appropriation Act of June 18, 1940 (54 Stat. 406, 420), for the fiscal year ending June 30, 1941, is typical:

* * * expenditures shall not exceed the aggregate receipts covered into the Treasury in accordance with section 4 of the Permanent Appropriation Repeal Act, 1934; * * *.

As has already been pointed out, expenditures do not necessarily represent costs for a particular year. If the collections are delinquent it may mean that some things that should have been done for a particular season may not be performed. The estimated assessments of necessity more nearly represent actual costs because they take into consideration depreciation on equipment and the use of inventories which may have been purchased in a prior year but not then carried into costs because the equipment or supplies were not actually used during the particular year when purchased. Furthermore, from season to season adjustments are made so the assessments over a period are equivalent to true costs.

* Flathead contract, item 17, p. 17; Mission contract, item 21, p. 13; Jocko contract, item 28, p. 17.

* Flathead contract, item 15, p. 16; Mission contract, item 19, p. 13; Jocko contract, item 26, p. 16.

It is argued that the United States does not have a lien for operation and maintenance charges on the Flathead Irrigation project because the principal portion of the money for operation and maintenance comes from the collections from the landowners rather than from the United States Treasury. The United States operates the project. The collections received represent the payments of a debt due the United States for a service performed for all of the landowners of the project and any unpaid assessments are accordingly a proper basis for a lien in favor of the United States. The payment of these assessments when received becomes the funds of the United States and it is necessary before the project can spend them that the expenditure be authorized by appropriation. The Appropriation Act for the fiscal year ending June 30, 1941, act of June 18, 1940 (54 Stat. 406, 420), provides:

For operation and maintenance of the irrigation and power systems on the Flathead Reservation, Montana, \$7,000, reimbursable, together with \$120,000 (operation and maintenance collections) and \$80,000 (power revenues), from which amounts of \$120,000 and \$80,000, respectively, expenditures shall not exceed the aggregate receipts covered into the Treasury in accordance with section 4 of the Permanent Appropriation Repeal Act, 1934; in all, \$207,000.

The second question of the opinion remains. This is the question of the legality of the interest penalty provided for in 25 CFR 100.8, which states that—

100.8. *Penalty for nonpayment of assessment.* All assessments duly authorized shall be paid on the due date to the properly designated officer of the Indian Irrigation Service at St. Ignatius, Montana, and on all such assessments not paid on the due date the irrigation district shall pay a penalty at the rate of 6 per centum per annum during the period of delinquency.

The contracts between the United States and the irrigation districts provide that the operation and maintenance charges should be paid as provided by law and by rules made and to be made thereunder by the Secretary of the Interior.⁹ At the time these contracts were executed the above regulation or a similar one was in force and effect and the parties to the contract therefore accepted such practice.

Further, the contracts provide that the United States "shall have the full right to enforce [its liens and obligations] by shutting off water *or otherwise* as it shall see fit."¹⁰ [Italics supplied.] The contracts also provide specifically that the right to refuse to de-

⁹ Flathead contract, item 15, p. 16; Mission contract, item 19, p. 13; Jocko contract, item 26, p. 16.

¹⁰ Flathead contract, item 8, p. 7; Mission contract, item 10, p. 8; Jocko contract, item 14, p. 9.

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liver water is not an exclusive remedy "and shall not in any manner hinder the United States from exercising any other remedy to enforce collection of any amount due" under the contracts.¹¹

The imposition of a 6 per cent interest charge against delinquent irrigation charge payments has been the regular administrative practice of the Indian Irrigation Service on this project and on all other projects for many years.

One of the most effective methods of enforcing the payment of obligations to the United States is the imposition of an interest penalty on delinquent payments. This is made all the more necessary by the statutory provision that expenditures cannot exceed collections. Therefore, it seems that this provision has been agreed to by the districts and is a necessary measure for the proper operation of the project.

The departmental decision of November 15, 1921 (48 L. D. 475), is not applicable. It holds that the Secretary of the Interior did not have authority to impose an interest penalty upon landowners in the Flathead Reservation under authority of the acts of August 13, 1914 (38 Stat. 686), or February 14, 1920 (41 Stat. 408). The opinion was rendered before the Flathead irrigation system was transferred from the Reclamation Service to the Indian Irrigation Service. Most important, however, there was at that time no acceptance of the practice by contract between the United States and the landowners represented by their districts.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

AUTHORITY TO IMPOUND DOMESTIC ANIMALS TRESPASSING IN NATIONAL PARKS

Opinion, August 4, 1942

SECRETARY OF THE INTERIOR—NATIONAL PARK SERVICE—NATIONAL PARKS AND
MONUMENTS—REGULATIONS—IMPOUNDING AND SALE OF TRESPASSING DO-
MESTIC ANIMALS—CONSTITUTIONAL LAW—FEDERAL "POLICE POWER" OVER
LANDS OWNED BY THE UNITED STATES.

The Congress may provide for the impounding and sale of domestic animals trespassing on Federal lands in the exercise of its "police power" pursuant to Article IV, section 3 of the United States Constitution. In authorizing the Secretary of the Interior to "protect" and "preserve" and regulate the

¹¹ Flathead contract, item 19, p. 18; Mission contract, item 23, p. 14; Joeko contract, item 30, p. 17.

"use" of parks and monuments in the act of August 25, 1916 (39 Stat. 535, 16 U. S. C. secs. 1-3), Congress has impliedly empowered the Secretary to prescribe regulations designed to provide for the impounding and sale of domestic animals trespassing on park and monument areas.

COHEN, *Acting Solicitor*:

My opinion has been asked on the question whether regulations may be promulgated for the areas administered by the National Park Service which would authorize the impounding and sale or destruction of trespassing domestic animals. In asking this question the National Park Service calls attention to regulations approved December 19, 1940, applicable to the areas under the jurisdiction of the Fish and Wildlife Service (50 CFR 12.16), and suggests that the regulations it has in mind for the park and monument areas are comparable to the Fish and Wildlife regulations. The latter provide in effect that trespassing domestic animals may be impounded and disposed of in accordance with applicable State statutes, and that in the absence of such statutes, upon notice to the owners and failure to redeem by payment of expenses for capturing, advertising, pasturing, feeding and impounding, and any property damage, the officers are to sell the animals at a public sale, or privately sell, or otherwise dispose of them if no public sale is effected.*

It is my opinion that the Secretary probably has authority to promulgate such regulations for the park and monument areas, but since the matter is not free from doubt and involves the taking of private property by Government officers who may be held liable in damages should the courts hold their actions unauthorized, the National Park Service may prefer to request legislation specifically authorizing this procedure.

Clearly, the Congress may provide for the procedure as an exercise of its "police power" over lands owned by the United States, pursuant to Article IV, section 3 of the Constitution, which provides that "Congress shall have power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States." *Camfield v. United States*, 167 U. S. 518; *Utah Power & Light Co. v. United States*, 243 U. S. 389; *Lawton v. Steele*, 152 U. S. 133. Congress, however, has not itself provided an impounding procedure for parks and monuments, nor has it specifically authorized the Secretary of the Interior to do

* The National Park Service refers to the Solicitor's Opinion dated October 18, 1934 (M. 27748). This opinion did not purport to cover the question now raised since the regulations then in existence did not provide for the sale or destruction of trespassing animals, and such regulations were not proposed.

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so. The question then is whether it may reasonably be said to be impliedly authorized by the statutes which in general terms prescribe the powers and functions of the Secretary of the Interior and the Director of the National Park Service.

Section 1 of the act of August 25, 1916 (39 Stat. 535, 16 U. S. C. sec. 1), provides that the National Park Service "shall promote and regulate the use of the Federal areas known as national parks, monuments, and reservations hereinafter specified by such means and measures as conform to the fundamental purpose of the said parks, monuments, and reservations, which purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such manner and by such means as will leave them unimpaired for the enjoyment of future generations." By section 2 of this act (16 U. S. C. sec. 2), the Director of the National Park Service, under the direction of the Secretary of the Interior, is charged with "the supervision, management, and control" of the several national parks and national monuments. Section 3 of the act (16 U. S. C. sec. 3), provides that "the Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service." Section 3 of the act also authorizes the Secretary to "provide in his discretion for the destruction of such animals and of such plant life as may be detrimental to the use of any of said parks, monuments, or reservations," and "under such rules and regulations and on such terms as he may prescribe, grant the privilege to graze live stock within any national park, monument, or reservation herein referred to when in his judgment such use is not detrimental to the primary purpose for which such park, monument, or reservation was created, except that this provision shall not apply to the Yellowstone National Park."

It is clear that by the foregoing enactments Congress intended to grant to the Secretary of the Interior the power to make all regulations necessary for the preservation and protection of the national parks, monuments and reservations entrusted to his control and jurisdiction. He is, moreover, expressly authorized to "regulate the use of" these areas, particularly with regard to destructive animals and grazing live stock. Such a grant of power is valid. *United States v. Grimaud*, 220 U. S. 506.

The presence within the national parks and national monuments of trespassing domestic animals is clearly detrimental and injurious in that their grazing impairs the natural features of the areas and

is an unauthorized and unregulated use of Federal property. In such circumstances, the Secretary is empowered to prescribe regulations designed to abate this evil in the performance of his duty to "protect" and "preserve" and regulate the "use" of the park and monument areas, if reasonable and not inconsistent with or prohibited by law. Sections 1 and 3, act of August 25, 1916, *supra*; *Maryland Casualty Co. v. United States*, 251 U. S. 342, 349; *United States v. Morehead*, 243 U. S. 607, 613, 614.

The proposed regulations will provide a procedure for impounding and disposing of animals found trespassing on national parks and monument areas. Owners of livestock will thus be admonished to restrain their animals from trespassing on the areas in question, and to remove them immediately if they do. They will provide a method to be followed in gathering and removing trespassing animals from the areas in question, impounding them, notifying the owners and giving them an opportunity to recover the animals after paying the damages and the expenses of impoundment, and if not so recovered, the animals may be sold or otherwise be disposed of.

Such regulations are, in my judgment, reasonably related and adapted to the preservation, protection and use of the parks and monuments, and I know of no law with which they are inconsistent or which prohibits their adoption. Hence, the courts would probably hold them valid.

This conclusion is supported by rulings and decisions rendered in connection with similar regulations promulgated by the Secretary of Agriculture for the national forests. See 36 CFR 261.13. In promulgating these regulations the Secretary of Agriculture relied on the powers granted to him by Congress to preserve the forests from destruction and to regulate their occupancy and use (16 U. S. C. sec. 551), which are substantially the same as those granted to the Secretary of the Interior over parks and monuments. These forest impoundment regulations have been held valid by the Solicitor of the Department of Agriculture and by the courts. Solicitor's letter, August 19, 1925, to Assistant to Solicitor of Department of Agriculture;* *United States of America v. Dodd L. Grier et al.*, Equity No. 130 Prescott, District Court of United States for District of Arizona, Northern Division, final decree, July 2, 1929; *cf. United States v. Gurley*, 279 Fed. 874, 876.

Moreover, the like regulations relating to areas under the jurisdiction of the Fish and Wildlife Service (50 CFR 12.16), which are based on a similar grant of power, were approved by the Solicitor's

* Letter referred to may be found in the files of the Solicitor's Office.

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Office prior to their approval by the head of the Department on December 19, 1940.

However, in prescribing payment by the owners of trespassing animals of expenses and damages and providing for the sale or other disposal of such animals, the regulations proposed by the National Park Service are not limited to the recovery by the United States of the actual damage, but by providing for the destruction, sale, or other disposition of the trespassing animals in effect prescribe a penalty. The Supreme Court has held that penalties may only be provided for by Congressional enactment. *United States v. Eaton*, 144 U. S. 677, 687, 688; *United States v. Grimaud*, 220 U. S. 506, 519. While these cases relate to criminal penalties as such, it may conceivably be argued that the principle applies to the penalty of these regulations. In answer to this, however, it can be said that the penalty aspect of the regulations would only exist as a necessary incident of their primary purpose, which would be the establishment of a method of disposal of trespassing animals, required for the protection and preservation of the parks and monuments. Also, the fact that the owners of trespassing animals have an opportunity under the regulations to recover these animals, and would only forfeit them in the event they fail to exercise this right, in a sense imparts a voluntary character to the forfeiture.

Although I think it unlikely that they will do so, if the courts should hold the proposed regulations invalid, they may also hold the Federal officers enforcing them personally liable to the owners of the animals. See *Belknap v. Schild*, 161 U. S. 10, 18; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 619, 620. While I am of the opinion, therefore, that the proposed regulations are authorized and valid, I suggest that if the National Park Service officials desire to avoid the risk of personal liability, Congress be requested to enact legislation which will specifically provide for the procedure contemplated by the proposed regulations.

Approved:

ABE FORTAS,

Under Secretary.

THE EFFECT OF COUNTY ZONING ORDINANCES ON LAND ACQUIRED BY THE UNITED STATES IN TRUST FOR INDIANS

Opinion, August 8, 1942

ZONING ORDINANCES—INDIAN LANDS—EXEMPTION OF INDIAN LANDS FROM LOCAL ORDINANCE.

Zoning is a proper exercise of the police power of a municipality, county or State. The courts have uniformly held that the United States may perform its functions without conforming to State, county or municipal police regulations. Land acquired by the United States in trust for Indians is, in effect, land of the United States. Zoning ordinances do not affect such lands.

COHEN, *Acting Solicitor*:

In accordance with the request from the Office of Indian Affairs an examination has been made of the title data relating to 1.75 acres of land, more or less, Tract No. 28, Cloquet and Sawyer Tribal Funds project in Carlton County, Minnesota.

Carlton County, Minnesota, passed a zoning ordinance approved May 7, 1940 (entry 23 of the abstract), which provides that no building or structure shall be erected, occupied or used by any person or persons as an established home or with intent to establish a home therein in any restricted district unless such home is necessary for use and is used solely in connection with a mine, quarry, gravel pit, hydro dam, private dam, flowage area, transmission line or substation.

The Land Field Agent reports it is not anticipated that the land under consideration will be used as home sites; however, since at some future date, the Indian Office might desire to use the land for home sites, the question arises as to whether this zoning ordinance affects the land under consideration after its acquisition by the United States. The lands proposed for purchase by the United States are affected by this ordinance. Zoning is a proper exercise of the police power of a municipality, county or State. *Pearsall v. Great Northern Railway Co.*, 161 U. S. 646.

The courts have uniformly held that the United States may perform its function without conforming to the police regulations of a State, and that when the exercise of the State police power interferes with the performance of a proper governmental function of the United States, the State police power must give way. *James Stewart and Co., Inc. v. Sadrakula*, 309 U. S. 94; *Oklahoma City v. Sanders*, 94 F. (2d) 323; *James v. Dravo Contracting Co.*, 302 U. S. 134. One of the leading cases on this subject is *Arizona v. California*, 283 U. S. 423, 51 Sup. Ct. 522. The United States constructed a dam. Certain State regulations required a submission of plans

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and specifications for the building of dams to the State engineer for approval. The Secretary of the Interior did not comply with these State regulations. In passing upon this point the court said:

If Congress has power to authorize the construction of the dam and reservoir Wilbur is under no obligation to submit the plans and specifications to the State engineer for approval.

The court cited *Johnson v. Maryland*, 254 U. S. 51, 41 Sup. Ct. 16; and *Hunt v. United States*, 278 U. S. 96, 49 Sup. Ct. 38, in support of this fundamental principle.

In *Oklahoma City v. Sanders*, 94 F. (2d) 323, the Circuit Court of Appeals held that municipal ordinances relating to licenses, bonds and inspections do not apply to a contractor building a low-cost housing project for the United States on land owned by the United States within the State of Oklahoma.

For a discussion of the conflict of the police power of the State with the interests of the Federal Government see Note in 7 Tex. L. Rev. 471. The case of *Hunt v. United States*, *supra*, is reviewed in this Note. The facts in this case were that deer became so plentiful in the Kaibab National Forest that they overbrowsed upon and killed valuable young trees. The district forester acting under an order of the Secretary of Agriculture killed large numbers of the deer and shipped them out of the forest. This action was necessary to protect the forest. State officers acting under a game law of the State of Arizona sought to prevent the execution of the order and the United States brought suit for an injunction to restrain the officers from interfering with the district forester. It was held that the injunction should issue and that in case of a conflict between the police power of the State and the interests of the Federal Government, the latter should prevail. See also *McCulloch v. Maryland*, 4 Wheat. 316; *Utah Power & Light Company v. United States*, 243 U. S. 389; and *Panhandle Oil Co. v. Mississippi*, 277 U. S. 218.

In *United States v. 4,450.72 acres of land, Clearwater County, State of Minnesota*, 27 F. Supp. 167, the court had before it the question of the right of the United States to condemn land owned by the State and dedicated to a public use. The State of Minnesota had set the land apart as a hunting preserve. The United States desired to acquire the land for the Indians as a wild rice reserve. The United States attempted first to purchase the land from the State, and being unable to do so, filed petition to condemn the land. The court held that:

If the public use of both sovereigns is mainly directed to the aid and assistance of the Indians, the Federal Government has the exclusive duty to look

after its wards and in carrying out this Federal power, it cannot be restricted by the State.

The United States is authorized to acquire the lands in question in trust for the Indians. Such land is in effect land of the United States. *United States v. Rickert*, 188 U. S. 432. The State or county in the exercise of its police power may not interfere by zoning ordinance or otherwise with any use of this land by the sovereign, so long as the use thereof is authorized by the laws of the United States.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

VALIDITY OF PUERTO RICO AUTHORITY LEGISLATION

Opinion, August 10, 1942

CONSTITUTIONALITY OF STATUTES.

Opinions will not be rendered on the constitutionality of a statute unless statutory duties alleged to be in conflict with constitutional limitations are placed upon the Executive department.

CONSTITUTIONALITY OF STATUTES—PUERTO RICO.

Where the constitutionality of certain Puerto Rican statutes has been called into question by the Attorney General of Puerto Rico and the Auditor of Puerto Rico, a Presidential appointee, is in doubt whether to follow the said statutes, the Secretary of the Interior may properly advise as to the constitutionality thereof, in so far as they bear upon the duties of the Auditor.

INDEPENDENT GOVERNMENTAL INSTRUMENTALITIES—PUERTO RICO ORGANIC ACT.

Independent instrumentalities of the Government of Puerto Rico may be exempted from usual forms of auditing without violation of the Organic Act of Puerto Rico.

The Puerto Rico Water Resources Authority, the Puerto Rico Transportation Authority, the Puerto Rico Communications Authority, and the Puerto Rico Development Company are constitutionally valid independent agencies not parts of any executive department or bureau.

COHEN, *Acting Solicitor:*

The opinion of the Solicitor has been requested on the validity of various portions of the acts of the Puerto Rico Legislature amending the act creating the Puerto Rico Water Resources Authority¹ and creating the Puerto Rico Transportation Authority,² the Puerto Rico Communications Authority³ and the Puerto Rico Develop-

¹ Act of April 8, 1942 (No. 19).

² Act of May 7, 1942 (No. 125).

³ Act of May 12, 1942 (No. 212).

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ment Company.⁴ The request arises from opinions of the Attorney General of Puerto Rico submitted to the Executive Secretary and the Auditor of Puerto Rico in which doubts as to the validity of this legislation were expressed, and from the submission to you by the Auditor of the Attorney General's opinions.

It is ordinarily the position of this office that a Government officer ought not to question the validity of an enactment of a legislature after it has received the approval of the Executive; exceptions to this rule must be limited to cases where duties in conflict with constitutional limitations are laid upon the Executive department, and opinions expressed in such cases should be narrowly limited to the resolution of such particular conflicts. Such a position is particularly appropriate with respect to the enactments that are now before me. If he has not already done so, the Governor will shortly submit to you for transmission to Congress copies of all laws enacted during this session.⁵ Congress will then have an opportunity to annul the statutes under the power which it has reserved for itself in section 34 of the Organic Act⁶ if it believes them to be invalid or unwise, to put a definite stamp of approval on them, or to do nothing. While it is true that Congress' failure to set them aside will not save them if they are clearly in conflict with the Organic Act,⁷ it is also true that its failure to do so may be taken as an indication of its belief that they are valid.⁸ This rule, which has been enunciated by the courts in cases dealing with private individuals' claims, is, I believe, even stronger when the problem is one of distribution of governmental authority and power.

Were it not that the Auditor is a Presidential appointee who, to that extent, stands in a somewhat different relation to the Puerto Rico Legislature from that of an ordinary Executive officer and were it not that the Attorney General's views on the invalidity of these acts might lead to unnecessary administrative difficulties, I should doubt whether it is proper for me to consider, on behalf of the Auditor, the questions which have been laid before me.⁹ These considerations, however, dictate a contrary course. But, with your

⁴ Act of May 11, 1942 (No. 188).

⁵ Act of March 2, 1917, ch. 145, sec. 23 (39 Stat. 958, 48 U. S. C. sec. 842); act of March 2, 1917, ch. 145, sec. 34 (39 Stat. 961), as revised by the act of February 28, 1929, ch. 364 (45 Stat. 1348, 48 U. S. C. sec. 826).

⁶ *Supra*, note 5.

⁷ *Cf. Springer v. Philippine Islands*, 277 U. S. 189, 209 (1928).

⁸ *People of Porto Rico v. American R. Co. of Porto Rico*, 254 Fed. 369, 377 (C. C. A. 1, 1918), *cert. denied*, 249 U. S. 600 (1919); *Gallardo v. Porto Rico Railway Light & Power Co.*, 18 F. (2d) 918 (C. C. A. 1, 1927); *South Porto Rico Sugar Co. v. Munoz*, 28 F. (2d) 820 (C. C. A. 1, 1928).

⁹ Attorney General to the President, 39 Op. Atty. Gen. 11 (1937).

permission, I shall not go any further than is necessary to indicate my views on those questions which are of particular concern to the Auditor in the performance of his functions and duties under the Organic Act. In brief, I shall not attempt to pass on the validity of the whole of any of these enactments.

The Auditor's most immediate problem is that of his duty in connection with an appropriation of \$1,000,000 to the Puerto Rico Transportation Authority. The appropriation is in these words:¹⁰

The sum of one million (1,000,000) dollars is hereby appropriated from any funds in the Treasury not otherwise appropriated, to carry out the provisions of this Act, and the Treasurer is authorized and directed to pay said sum to the Authority, or to the officer or agent thereof that the Board may designate for the purpose.

In his letter of May 18 to the Attorney General the Auditor wrote:

I shall appreciate that you please make a thorough study of the different particulars of this law and offer me your opinion as to whether or not they fall within the constitutional provisions of the Organic Act, and particularly Section 24 of the law which authorizes the Treasurer of Puerto Rico to pay \$1,000,000.00 to the Authority or the Officer or Agent that the Board may designate for the purpose seemingly without intervention of the Auditor.

To this, the Attorney General replied on the same date:

An appropriation duly made by law does not make it necessary that the Treasurer and the Auditor be specifically authorized and ordained to place the amount of the appropriation at the disposal of the Officer or Board authorized to make use of such moneys. The appropriation, however, is subject to compliance with the provisions of the Organic Act and existing statutory provisions relative to the disbursement of the moneys involved in the appropriation.

And the Auditor has now written to you in a letter of the same date:

This Office is being pressed for payment of the one million dollars referred to in Section 24 of the Act * * * and as the policy of the Auditor is to cooperate fully with the Governor and Legislature in their plans, ordinary payments will be approved within the amount appropriated.

This Office is doubtful about the propriety of challenging the constitutionality of the Act in the Courts, or initiating a declaratory judgment, certainly not before the matter is referred to your Office, therefore it will be appreciated if you will have a study made by such authority as you deem appropriate, and kindly suggest the course the Auditor should pursue. There are no precedents on file covering this and similar problems, now being presented to this Office.

Though the Auditor is not specifically mentioned in the appropriating portion of the act to which he has referred, I do not

¹⁰ *Supra*, note 2, sec. 24. Similar appropriations to the Communications Authority and to the Development Company are made in secs. 28 and 23 of their respective acts, *supra*, notes 3 and 4.

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understand it to mean that the Treasurer may disburse the funds appropriated without a warrant from him. This is required by the provision of section 15 of the Organic Act that ¹¹ —

The Treasurer shall collect and be the custodian of public funds, and shall disburse the same in accordance with law, on warrants signed by the auditor and countersigned by the governor * * *.

I am not informed that the Treasurer intends to disburse funds without an Auditor's warrant or that the Transportation Authority is pressing him to do so. There is, therefore, no occasion to advise the Auditor to withhold or to discontinue payments.

Beyond this immediate question, the Attorney General has advised the Auditor that the acts trench on the authority that has been given to him by the Organic Act. I have already pointed out that under section 15 of this act the Treasurer is ordered to disburse the funds committed to him "in accordance with law, on warrants signed by the auditor and countersigned by the governor * * *." Section 20 ¹² of the same act gives the Auditor authority to "examine, adjust, decide, audit, and settle all accounts and claims pertaining to the revenues and receipts from whatever source of the government of Puerto Rico" and to "examine, audit, and settle" all expenditures of that government, requires him to "perform a like duty with respect to all government branches," grants him exclusive jurisdiction over the government's accounts "and all vouchers and records pertaining thereto" and provides that, in making his decisions, he shall "have like authority as that conferred by the law upon the Comptroller General of the United States * * *."

By contrast, the Water Resources Authority Act ¹³ provides that the funds of the Authority shall be disbursed by it "pursuant to regulations and budgets" approved by its Board.¹⁴ It further provides ¹⁵ that the Auditor—

shall, upon consultation with the Authority, establish the accounting system required for the proper statistical control and record of all expenses and income belonging to or managed or controlled by the Authority.

and that he "shall from time to time, examine the accounts and books of the Authority * * * and shall report thereon to the Board of the Authority and the Legislature."

¹¹ Act of March 2, 1917, ch. 145, sec. 15 (39 Stat. 956, 48 U. S. C. sec. 780).

¹² Act of March 2, 1917, ch. 145, sec. 20 (39 Stat. 957), as amended by the acts of March 4, 1927, ch. 503, sec. 3 (44 Stat. 1419), and May 17, 1932, ch. 190 (47 Stat. 158); 48 U. S. C. secs. 786, 787, 788.

¹³ I use this act as an example; the other three are quite similar to it as far as the matter under discussion is concerned.

¹⁴ *Supra*, note 1, sec. 12.

¹⁵ *Ibid.*

The Attorney General, reading these provisions and contrasting them with the legislation, concludes:

It is my opinion that while the Authority may be considered as a body separate and apart from the Insular Government, it can only properly be so considered for purposes of administrative policy; its funds are public funds and the keeping, disbursement, and disposal thereof are subject to the powers of * * * the Auditor of Puerto Rico, as such powers are outlined in sections 15 and 20, respectively, of the Organic Act.

I may point out first that, even if the Attorney General is correct in his views, the invalidity of the portions of the act relating to the Auditor's authority will not affect the carrying out of the remainder of the act.¹⁶ But, in any event, I cannot agree with the Attorney General's conclusion. I have already said that funds appropriated to the Authority from the public treasury are public funds and that they are subject to the Auditor's jurisdiction. I do not believe that these funds, once they have reached the Authority's treasury, are "public funds" within the meaning of section 15 of the Organic Act or that other moneys coming into its treasury from bond issues or from other sources are such funds.¹⁷

The considerations which lead me to this conclusion also persuade me that an independent corporate instrumentality, such as the Authority, should be regarded as separate and distinct from and not within the meaning of the "government of Puerto Rico" and "government branches," with respect to the revenues and expenditures of which the Auditor has jurisdiction under section 20 of the Organic Act.

The courts have frequently held such activities as those involved in the Water Resources Authority Act exempt from the controls ordinarily imposed on Government officers. The point is illustrated by the host of cases holding that constitutional and statutory limitations on the creation of public debts do not apply to self-sustaining business projects of municipalities or States,¹⁸ by the acquiescence of the courts of various States in their legislatures' freeing special undertakings—sometimes commercial, sometimes not—from control

¹⁶ Cf. section 28 of the act, *supra*, note 1: "If any provisions of this Act or the application of such provisions to any person or circumstance shall be held invalid, the remainder of the Act and the application of such provisions to persons or circumstances other than those as to which it shall have been held invalid shall not be affected thereby."

¹⁷ Cf. Opinion of the Solicitor of the Department of the Interior, November 19, 1941, 57 I. D. 392.

¹⁸ *Lang v. City of Mobile*, 239 Ala. 331, 195 So. 248 (1940); *California Toll Bridge Authority v. Kelly*, 218 Calif. 7, 21 P. (2d) 425 (1933); *Sheldon v. Grand River Dam Authority*, 182 Okla. 24, 76 P. (2d) 355, 362 (1938); *Clarke v. South Carolina Public Service Authority*, 177 S. C. 427, 181 S. E. 481 (1935); *Barnes v. Lehi City*, 74 Utah 321, 279 Pac. 878 (1929); *Ajaz v. Gregory*, 177 Wash. 465, 32 P. (2d) 560 (1934).

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by the usual officers¹⁹ and from the requirement that no money be spent save under an appropriation act,²⁰ and by their willingness to allow compromise of debts owed such a Government enterprise when the State constitution forbids such compromises generally.²¹

This freedom from the usual control exists, as many of these cases make clear, even where the funds are being handled by ordinary Government departments. There is no reason why it should be less in the case of such a public corporation as the Water Resources Authority. We are told, in fact, that this is one reason why the public corporation is frequently resorted to.²² It is true that these corporations may be "public" enough to be accorded the benefits and protection that other Government agencies are accorded; it does not follow that they must be subjected to the same restrictions to which other Government agencies are subjected. The difference is well illustrated by the Emergency Fleet Corporation litigation after the last war. In *United States ex rel. Skinner & Eddy Corp. v. McCarl*,²³ the Supreme Court held that the corporation's contracts and its claims on these contracts were not within the jurisdiction of the Comptroller General. At the same term of Court, in *Emergency Fleet Corporation v. Western Union Telegraph Co.*,²⁴ it nevertheless held that the corporation was entitled to the reduced rates fixed by the Postmaster General for telegraph messages sent out by Government agencies.²⁵

¹⁹ *Wyatt v. Beall*, 175 Md. 258, 1 A. (2d) 619 (1938); *State ex rel. Olson v. Jorgenson*, 29 N. Dak. 173, 150 N. W. 565 (1915); *State ex rel. Linde v. Taylor*, 33 N. Dak. 76, 156 N. W. 561 (1916); *State ex rel. Stearns v. Olson*, 43 N. Dak. 619, 175 N. W. 714 (1919); *City of Seattle v. Stirrat*, 55 Wash. 560, 104 Pac. 834 (1909); *State ex rel. Sherman v. Pape*, 103 Wash. 319, 174 Pac. 468 (1918). See also *Opinion of the Justices*, 261 Mass. 523, 159 N. E. 55 (1927); *State ex rel. Kozitzky v. Waters*, 45 N. Dak. 115, 176 N. W. 913 (1920). Cf. *Langer v. North Dakota*, 69 N. Dak. 129, 284 N. W. 238 (1939). The earlier North Dakota cases, coming as they did at a time when that State was first engaged in enterprise of much the same sort as Puerto Rico is now embarking on, are particularly important.

²⁰ *Tatum v. Wheelless*, 178 So. 95 (Miss., 1938); *State ex rel. Washington Toll Bridge Authority v. Yelle*, 195 Wash. 636, 82 P. (2d) 120 (1938).

²¹ *Chez v. Industrial Commission of Utah*, 90 Utah 447, 62 P. (2d) 549 (1936).

²² *United States ex rel. Skinner & Eddy Corp. v. McCarl*, 275 U. S. 1, 8 (1927); *Stoke, Government Corporations and Federal Funds*, 222 (1938).

²³ *Supra*, note 22.

²⁴ 275 U. S. 415 (1928).

²⁵ See also *United States v. Strang*, 254 U. S. 491 (1921) (an employee of the Fleet Corporation is not an agent of the United States within section 41 of the Criminal Code), and with it compare *United States v. Walter*, 263 U. S. 15 (1923) (demurrer to indictment charging conspiracy to defraud the United States by presenting false claim against Fleet Corporation overruled; "while it is true that the corporation is not the United States * * *, the contemplated fraud upon the corporation if successful would have resulted directly in a pecuniary loss to the United States, and even more immediately would have impaired the efficiency of its very important instrument"). For additional cases dealing with protection of Federal corporations, see *U. S. Grain Corporation v. Phillips*, 261 U. S. 106 (1923); *Clallam County v. United States*, 263 U. S. 341 (1923); *Inland Waterways Corporation v. Young*, 309 U. S. 517 (1940); cf. *The Western Maid*, 257 U. S. 419 (1922).

I believe, moreover, that the particular provisions to which the Attorney General of Puerto Rico has referred ought not to be read apart from the remainder of the legislation and that, when thought of in the light of the whole act, they cannot be said to be invalid. The statute, with meticulous care, has built an organization which, while it is public in the work it does and in its chief officers, is set far apart from the routine work of governing the territory. It is a business venture on the part of the Insular Government. Its funds are not raised by taxation or derived from the public treasury. Its employees, though accorded some of the benefits of the Civil Service system, are its own. It is subject to suit in as free a way as any purely private enterprise. And it is deliberately subjected to the possibility of a receivership being imposed on it if its revenues are insufficient to meet its obligations. It is the Legislature's treatment of these obligations which is most indicative of the extent to which the Authority is divorced from the Insular Government. Thus section 3(b) provides that—

* * * The debts, obligations, contracts, bonds, notes, debentures, receipts, expenditures, accounts, funds, undertakings, and property of the Authority * * * shall be deemed to be those of said government-controlled corporation and not to be those of the Insular Government * * *.

Section 6(s) provides:

* * * That the Authority shall have no power at any time or in any manner to pledge the credit or taxing power of The People of Puerto Rico * * * nor shall The People of Puerto Rico * * * be liable for the payment of the principal of or interest on any bonds issued by the Authority.

Section 20 likewise provides that—

The bonds and other obligations issued by the Authority shall not be a debt of The People of Puerto Rico * * * and * * * The People of Puerto Rico * * * shall [not] be liable thereon, nor shall such bonds or other obligations be payable out of any funds other than those of the Authority.

Taken together these provisions spell a good reason for not requiring that the Authority be subject to the controls which are imposed on the Government as such. Added to the authorities I have set out above, they make it seem quite unlikely that the provisions of the act which I have been discussing will be held invalid.

A larger question,²⁶ however, is whether the Puerto Rico Development Company Act and the Puerto Rico Communications Authority Act conflict with section 37 of the Organic Act.²⁷ The Attorney Gen-

²⁶ I assume for the sake of the discussion, though I am far from convinced that it is so, that this is a question which the Auditor, as chief overseer of the Insular Government accounts, can properly raise.

²⁷ Act of March 2, 1917, ch. 145, sec. 37 (39 Stat. 964, 48 U. S. C. sec. 774).

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eral raised no such objection to the Water Resources Authority when the original act was passed in 1941. The question, moreover, is not one of the authority of the Legislature to create a public corporation; the Attorney General's opinion on the Puerto Rico Development Company Act concedes that it may do so. Rather the question is whether in doing so in these instances the Legislature has created new Executive departments contrary to the section of the Organic Act cited. It is there provided: "No Executive department not provided for in this act shall be created by the legislature."²⁸ This section follows on the heels of section 13²⁹ which, as amended, provides for Departments of Justice, Finance, Interior, Education, Agriculture and Commerce, Labor, and Health.

Read broadly enough the term "Executive department" in section 37 would cover every activity engaged in by the Puerto Rican Government that is not assignable to its legislative or judicial branches. In this sense of the word, a great deal of Puerto Rican legislation that has been put on the books in the past would be invalid. The acts which have set up an Insular Sewer Service, a Food and General Supplies Commission, a Puerto Rican Coffee Price-Stabilizing Corporation, a Commission for the Promotion of Agricultural Co-operative Associations, a Tobacco Institute of Puerto Rico, a Public Amusements and Sports Commission, a Board of Registration of Technologists and Microscopists—to name only a few—would all be void. Fortunately, the matter need not be argued on so broad a scale as this for, as the Attorney General of Puerto Rico has said, "There is no hard and fast rule determining what an Executive department is. It depends largely upon the different statutes, the organization and the objects and purposes."

I take it that the Organic Act uses the term "Executive department" in much the same restricted sense as we in Washington do when we speak of the Executive departments and the independent agencies of the Federal Government—that is, as a major branch of the Executive headed by an officer of Cabinet rank. Just as we

²⁸ I am aware of no judicial construction of this or of any similar law. Article 66 of the amendments to the Constitution of Massachusetts to which the justices of the Supreme Judicial Court of that Commonwealth referred briefly in advising the Senate that a proposed enactment was invalid (271 Mass. 582, 171 N. E. 294; 299 (1930)) is far more explicit than this section of the Organic Act. It provides that "the executive and administrative work of the Commonwealth shall be organized in not more than 20 departments, in one of which every executive and administrative office, board and commission * * * shall be placed." New York has a somewhat similar provision in its constitution, Article 5, secs. 2 and 3. This, however, has not been used as a basis for challenging the Port of New York Authority Act (Laws, 1921, ch. 154) and was not used thus against the New York State Bridge Authority (Laws, 1932, ch. 548) while it existed.

²⁹ Act of March 2, 1917, ch. 145, sec. 13 (39 Stat. 955), as amended by the act of February 18, 1931, ch. 218, sec. 1 (46 Stat. 1168, 48 U. S. C. sec. 773).

would not include a Federal Power Commission within the term, so the Organic Act does not include a Public Service Commission among those enumerated in section 13. Just as we would not include a Federal educational institution within the term, so the Puerto Ricans do not include the University of Puerto Rico. I see nothing in the structure or in the powers of the company which compels the conclusion that it must be treated differently from these other agencies which are not enumerated in section 13 of the Organic Act, or that, if need be, it cannot be treated as one of those bureaus or offices the creation of which section 53 by clear implication allows without any requirement that they be set up in or assigned to one of the existing Executive departments.³⁰

As far as organization is concerned, the Development Company Act³¹ makes the members of the Executive Council of Puerto Rico "a body corporate and politic constituting a public corporation and governmental instrumentality." It provides that they shall select a board of five directors who, in turn, shall choose a general manager who, presumably, will be in active charge of the corporation's affairs.³²

The Development Company is to be financed by charges for its services,³³ by a bond issue of not more than \$5,000,000,³⁴ by an initial grant of \$500,000 from the insular treasury,³⁵ and by an annual grant of 10 percent of the government's revenues derived from income taxes.³⁶ In return for this last grant, the company is required to issue to the taxpayers "development certificates" on which it may pay interest up to 6 percent. The government's rights in the Puerto Rico Cement Corporation are also transferred to the company.³⁷

The company is empowered: ³⁸

- (1) To investigate the resources of Puerto Rico and methods for promoting their use;
- (2) To investigate the marketing of Puerto Rican products and the need of consumers;
- (3) To establish a design laboratory, "the duty of which shall be to prepare plans, specifications, and models of products suitable

³⁰ Act of March 2, 1917, ch. 145, sec. 53 (39 Stat. 968, 48 U. S. C. sec. 796).

³¹ It is on this act that the Attorney General has most fully spelled out his objections. If they are not valid as to it they are even less valid as to the others; this is clear from a reading of the four acts side by side.

³² *Supra*, note 4, secs. 4 and 5.

³³ *Supra*, note 4, secs. 6 and 7.

³⁴ *Supra*, note 4, sec. 14.

³⁵ *Supra*, note 4, sec. 23.

³⁶ *Supra*, note 4, sec. 24.

³⁷ *Supra*, note 4, sec. 13.

³⁸ *Supra*, note 4, secs. 6-9.

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for manufacture * * * in Puerto Rico or from raw materials available in Puerto Rico and industrial devices, equipment, plants and systems useful for such manufacture;"

(4) To lend money "to any person for the establishment, maintenance, operation, construction, reconstruction, repair, improvement or enlargement of any industrial mining or commercial enterprises in Puerto Rico or any agricultural enterprise incidental thereto;"

(5) To engage in enterprises on its own account involving the exploitation of the Island's raw materials; and

(6) To promote otherwise the investment of capital in Puerto Rico.

If it could be seriously argued that *all* of these powers are exclusively governmental and that *all* of them properly fall within the purview of one or another of the existing Executive departments, the validity of the Development Company Act would be very doubtful. But I see none among them which the Legislature could not give a private corporation. The fact that the Legislature has chosen to put them in the hands of what it properly describes as "a public corporation and governmental instrumentality" does not mean that they are any less validly given. In short, I see nothing in the organization or the financing or the authority of the Development Company which makes it an Executive department within the meaning of section 37 of the Organic Act.

I conclude, therefore, that the acts herein considered, in so far as they may affect the Auditor in the performance of his functions under the Organic Act, are valid.

Approved:

HAROLD L. ICKES,

Secretary of the Interior.

THE LONGVIEW COUNTRY CLUB ET AL.

Opinion, August 11, 1942

CLAIMS AGAINST UNITED STATES—PROPERTY DAMAGE—BLASTING—NEGLIGENCE— RES IPSA LOQUITUR.

The doctrine of *res ipsa loquitur* is applicable in cases of damage to privately owned property resulting from blasting operations conducted by Government employees and, in the absence of an explanation by the Government consistent with freedom from negligence, claims for such damage should be allowed and certified to the Congress for payment under the act of December 28, 1922 (42 Stat. 1066, 31 U. S. C. sec. 215).

GRAHAM, *Assistant Solicitor*:

The Longview Country Club, of Longview, Washington, and Public Utility District No. 1, of Cowlitz County, Longview, Washington, have filed claims in the amounts of \$150 and \$30.06, respectively, against the United States for compensation for damage to their properties as the result of blasting operations conducted by employees of the Bonneville Power Administration. The question whether the claims should be allowed and certified to the Congress under the act of December 28, 1922 (42 Stat. 1066, 31 U. S. C. sec. 215), has been submitted to me for opinion.

It is my opinion that the claims should be allowed.

The mishap which resulted in the damage occurred on February 25, when a blast of dynamite set off by employees of the Bonneville Power Administration in a gravel pit threw a shower of boulders and smaller rocks onto the properties of the claimants. Considerable damage resulted to the greens of the golf course, requiring, according to the statement from the claimant country club, "time of greenskeeper and assistant to patch and repair holes, special care of transplanted sod, replanting of areas from which sod was removed for patches, grass seed, fertilizer, water," in the amount of \$150. The estimate of the expense involved is well supported by affidavits of apparently qualified appraisers.

The same blast, according to the statement from the claimant Public Utility District No. 1, "threw a shower of boulders and smaller rocks into the air, thereby damaging Public Utility District's transmission line." An itemized sworn statement of the damage sustained, in the amount of \$30.06, is included in the record, together with a copy of an itemized invoice in support thereof.

Upon the record as presented, I am of the opinion that the doctrine of *res ipsa loquitur* is applicable to the present case. The leading case of *Slater v. Barnes*, 241 N. Y. 284, 149 N. E. 859, 860 (1925), cited with approval in *George Foltis, Inc. v. City of New York*, 261 App. Div. 1059, 26 N. Y. S. (2d) 609 (1941), establishes that the doctrine of *res ipsa loquitur* is based on the consideration that control of the thing that produced the injury is exclusively with the defendant. In that case the court stated:

That rule [*res ipsa loquitur*], amongst other things, is predicated upon the condition that the agency which has produced an injury is within the exclusive possession, control, and oversight of the person charged with negligence whence, legitimately, flows the inference that, if there is any explanation of the accident consistent with freedom from negligence, he ought to be able to give that explanation, and, if he does not give it, a presumption arises against him: * * * *Griffen v. Manice*, 166 N. Y. 188, 59 N. E. 925, 52 L. R. A. 922, 82 Am. St. Rep. 630.

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There is no evidence of record from the Bonneville Power Administration to refute the conclusion that the damages sought by the claimants resulted from injuries which could have been avoided had the blasting operations been conducted in a proper manner by its employees. The doctrine of *res ipsa loquitur* has been applied in various decisions of the Department involving similar situations, including *Gilbert Lowenstein* (M. 31700), approved March 11, 1942, *J. Max Hannon* (M. 30588), approved October 30, 1940, *Bursaw Oil Corporation* (M. 30463), approved March 23, 1940, *Homer Elliott* (M. 30480), approved January 17, 1940, and *William J. Cotter* (M. 29815), approved June 18, 1938.

Since the property damage is thus shown to have been caused by the negligence of the Government's employees, the claims should be allowed in the amounts of \$150 and \$30.06, respectively.

Approved:

HAROLD L. ICKES,

Secretary of the Interior.

STATUS OF PUBLIC AND INDIAN CEDED LANDS DRAINED BY THE STATE OF MINNESOTA UNDER THE VOLSTEAD ACT OF MAY 20, 1908

*Opinion, August 12, 1942**

VOLSTEAD ACT—RIGHTS AND DUTIES CREATED—LIMITATIONS—SATISFACTION OF DRAINAGE LIENS POSSIBLE BY VOLSTEAD SYSTEM OF DISPOSITION AND PATENT—CONDITIONS PRESCRIBED—MINNESOTA CONSERVATION ACTS IN AID OF DISTRESSED DRAINAGE DISTRICTS AND TAX FORFEITURE LAW INAPPLICABLE—DRAINAGE LIENS A BAR TO WITHDRAWAL FROM VOLSTEAD ENTRY ONLY.

The Volstead Act of May 20, 1908, permits the State of Minnesota to drain swamp and overflowed public and Indian ceded lands for agricultural purposes and to assess both entered and unentered lands under State drainage and tax laws. It disclaims any obligation on the part of the United States for such charges and gives no guarantee for payment thereof. But it provides for the disposition and the patenting of lien-burdened lands a system whereby the State's liens may be satisfied, if the conditions prescribed be fulfilled. The State tax law of 1927 provides for absolute forfeiture to the State of tax and drainage delinquent lands; and State conservation statutes of 1929, 1931 and 1933 provide for the utilization of forfeited lands in aid of distressed drainage districts.

Held, 1. That the Volstead Act confers on the State only the rights prescribed by its terms and that it adopts no State law incompatible therewith.
2. That the Congress contemplates transfer of United States title by issuance of United States patent under the terms of the act and by no other means and confers no power upon the State to divest the United

* Appendices referred to in this opinion may be found in the files of the Solicitor's Office.

States of its title in any manner whatever. 3. That the forfeiture provisions of the State tax law and the State Conservation Laws in aid of distressed drainage districts, which authorize no waiver of drainage liens but are predicated upon complete enforcement thereof by absolute forfeiture of tax delinquent lands to the State, are inapplicable to the drainage delinquent lands of the United States; and that it is error to regard such lands as thus forfeited and as subject to such laws. 4. That the only form of disposition, entry and patent to which a right is acquired by the State and those asserting a claim under it is that prescribed in the act, namely, Volstead entry and patent. 5. That this right excepts the land to which it is asserted from withdrawal from Volstead entry but does not bar withdrawal thereof from homestead entry or any other form of disposition under the public land laws.

NELSON ACT OF JANUARY 14, 1889, CEDING INDIAN LANDS—EXPRESS TRUST—EXECUTIVE POWER OF DISPOSITION RESTRICTED—CONGRESSIONAL POWER PLenary—INDIAN REORGANIZATION ACT OF JUNE 18, 1934—RESTORATION TO TRIBAL OWNERSHIP AUTHORIZED—WITHDRAWAL—EXISTING VALID RIGHTS.

The Nelson Act of January 14, 1889, appropriated the Indian lands ceded to the purposes of an express trust and prevented the Executive's disposition of them in any but a prescribed manner. But the Congress retained undiminished plenary power to change the method of disposition. In the Indian Reorganization Act of June 18, 1934, the Congress authorized restoration of the lands to tribal ownership, subject to existing valid rights. *Held*, 1. That the authorization to restore carried implicit authority in the Secretary of the Interior to order protective withdrawals of the lands pending restoration. 2. That the departmental orders of September 19 and November 2, 1934, were lawful and operated to withdraw the drained ceded lands from all forms of entry, subject to existing valid rights. 3. That the right to Volstead entry excepts the lands to which it is asserted by the State and those claiming under it from withdrawal from Volstead entry but does not bar their withdrawal from homestead entry or any other form of disposition under the public land laws.

COHEN, *Acting Solicitor*:

At the suggestion of the Commissioner of the General Land Office you [Secretary of the Interior] have inquired my opinion as to whether in consequence of her passage of certain statutes the State of Minnesota can be considered to have authorized relinquishment of State liens for drainage charges on certain public and Indian ceded lands in Minnesota. These lands the act of Congress of May 20, 1908 (35 Stat. 169), commonly known as the Volstead Act, declared subject to the State laws relating to the drainage of swamp or overflowed lands for agricultural purposes to the same extent and in the same manner as similar lands in private ownership, thus permitting the State to drain, assess and sell the lands for delinquent charges.

The lien-burdened lands in question, commonly described as "drainage homestead lands," are extensive, numbering about 231,537

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acres. Of these, 97,265 acres have been offered at tax judgment sales for unpaid drainage charges and, purchasers failing, are said to have been bid in by the State. The remaining 134,272 acres, while not reported as having been offered for sale, have nevertheless been assessed and therefore are likewise subject to Volstead liens.

These lands are found in nine counties in northern Minnesota—Beltrami, Clearwater, Koochiching, Lake of the Woods, Marshall, Pennington, Polk, Red Lake and Roseau, possibly in some others as well. But most of them lie in Beltrami, Koochiching and Lake of the Woods. By far the largest part of the acreage consists of Indian ceded lands. Under the statutes of cession¹ all lands other than pine lands were classified as "agricultural" lands and were to be disposed of under the provisions of homestead law and at a statutory price per acre for the benefit of the Indians to actual settlers only. Pending such sale the United States was to hold the naked fee to the lands in trust for the Indians.

As to all these lands, the Commissioner, it appears, is concerned for substantial reasons. Both the General Land Office and the Conservation Department of the State of Minnesota are of opinion that most of the lands impressed with the Volstead liens, although originally thought to be agricultural lands, are actually unsuitable for agricultural use and should be withdrawn from homestead entry. This action the Volstead liens, considered as valid rights existing in the State, have been deemed to bar. But it has been pointed out that should the State release the lands from the liens the particular withdrawal appropriate in the circumstances would at once attach and prevent homestead entry, in some cases upon such conditions as appear in applicable provisions of law, in other cases unconditionally.

As concerns public lands and the withdrawal of February 5, 1935, for example, section 7 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended, would control. This, it is argued, would make the Secretary's classification of any public lands sought by any applicant a condition precedent to allowance of any entry under the public land laws. The Commissioner could then deny an application for homestead entry of any lands classified as unsuitable for agriculture.

As concerns the Indian ceded lands, two reasons are given why they should be withdrawn from homestead entry. 1. They are thought to be unsuitable for agriculture. 2. It is considered to be

¹ The Nelson Act of January 14, 1889 (25 Stat. 642); the Morris Act of February 20, 1904 (33 Stat. 46, 48).

in the public interest that they should be restored to tribal ownership under section 3 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), and it is desired to prevent the initiation of new homestead rights in the lands pending accomplishment of such restoration. As to these lands, therefore, the Commissioner suggests, Minnesota's release of these lands from the Volstead liens would permit the departmental withdrawal orders of September 19 and November 2, 1934 (54 I. D. 559, 563), to attach to the lands and forthwith withdraw them from homestead entry.

In considering the problems thus arising the Commissioner inquires as to certain statutes enacted by Minnesota during recent years in aid of distressed drainage districts and as to the relation of these laws to the Volstead drained homestead lands embraced in such drainage districts. In particular the Commissioner asks whether any provisions of these laws may be construed as constituting "legislative authorization for certain administrative officers of the State to release the liens upon the drainage homestead lands not classified by the State as suitable for disposal." In other words, if the appropriate administrative officers of the State, acting under these statutes, classify any of these drainage homestead lands as not suitable for agriculture and disposal, do these statutes in effect authorize the release of the Volstead liens on such lands?

Upon examination of the laws to which the Commissioner refers, I find that far from intending to waive or abandon any of the drainage liens on any of the lands subject to the acts these statutes contemplate the complete satisfaction and enforcement of all the liens by the procedure most highly expressive of the sovereignty of the State, namely, forfeiture, the taking of the lands themselves in lieu of the unpaid charges on them. A release or waiver of the liens would amount only to relinquishment of the right to enforce them. It would relieve the owner of the charge on the lands but would in nowise affect his ownership of them. As between the State and the landholder all would be in the same posture as before the levy of the drainage assessment. In these laws however the Minnesota Legislature contemplates a complete change in ownership, the transfer to the State of a complete and indefeasible title in the lands by forfeiture under the general tax law of the State, that title "to be held and used or disposed of" by the State as absolute owner. Full State ownership and unrestricted State administration of the lands are the indispensable basis of the legislature's plan for the lands subject to the acts.

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The particular statutes in question are L. 1929, ch. 258²; L. 1931, ch. 407³ and L. 1933, ch. 402.⁴ Of these, the first created the Red Lake Game Preserve in the counties of Lake of the Woods, Beltrami and Koochiching. The second and third gave general authorization for the creation, in specified circumstances, of State-owned and State-managed conservation areas and wildlife preserves and the establishment in them of various conservation projects capable of producing revenue.

Although thus dealing with conservation measures, these acts were designed primarily to protect the credit of the State and to relieve certain taxing districts whose drainage bonds were in imminent danger of default because of the long-standing general delinquency of the drainage assessments levied to meet the bonds. Identical preambles⁵ giving detailed reasons for these laws made clear that this grave financial situation resulted from the unsuitability of the drained lands for the agricultural uses for which they had been ditched but that it could be relieved at least in part by suitable uses of the delinquent lands under State ownership and administration. Each act therefore provided for a financial system whereby the drainage bonds of distressed counties might be met and it also authorized such uses of the delinquent lands as the State might determine to be appropriate and capable of contributing some revenue to the relief funds established.

The necessary State ownership of the lands thus to be administered was to come about under the general tax law as amended by L. 1927, ch. 119.⁶ This provides for absolute forfeiture to the State of lands bid in for the State at the annual delinquent tax sale and remaining unredeemed at the expiration of five years from such sale. Upon the expiration of that period such lands become the absolute property of the State or its assigns, with no right of redemption outstanding. The general tax law also provides for classification of the forfeited lands as agricultural and nonagricultural, and for their appraisal and sale by the State as owner, with distribution of the proceeds to the counties entitled thereto.

These principles of dealing with tax delinquent lands are utilized by the remedial statutes here considered. When the delinquent lands

² Mason's Minnesota Statutes, 1927, v. 3, 1940 Supp. secs. 5620—5620-13; amendments, secs. 5620-13½ to 5620-13½j.

³ *Ibid.*, secs. 6452-1—6452-18.

⁴ *Ibid.*, secs. 4031-75—4031-88.

⁵ See Appendix I for the text of the preamble to the Red Lake Game Preserve Act of 1929.

⁶ Mason's Minnesota Statutes, 1927, v. 1, secs. 2139-2—2139-5 (L. 1927, ch. 119, secs. 1-6).

become the property of the State, the State Department of Conservation classifies them as to their suitability for agriculture or for conservation purposes. Only those receiving an agricultural classification are subject to sale. As owner the State pushes their disposition by recurrent offerings until they are sold. Then an appropriate conveyance in fee is issued to the purchaser or his assignee by the State auditor. This has the force and effect of a patent from the State. In it all minerals and mineral rights are reserved to the State. In addition, some lands are subject to rental. Further, timber on any of them may be sold if it can be removed without damage to the lands. Lands classified as conservation lands may not be sold but are held and used by the State in various kinds of conservation projects. These may be afforestation, reforestation, fire or flood control, preserves for the propagation of wildlife and native flora, hunting and fishing grounds or projects for other State purposes. By all these uses many long-term interests of the State are served. But, in addition, from the sale of lands, of timber, of specimens of wildlife and rare plants and from licenses to hunt and fish in the preserves considerable revenue may be derived for contribution to the special funds set up by the State to liquidate the drainage bonds.

All these administrative acts are performed by the State as owner of the lands. Unless lien-burdened lands become forfeited to the State under the provisions of the general tax law cited the State may take none of these steps. It is clear therefore that, if the unredeemed drainage homestead lands of the United States are forfeited to the State like private lands in similar case, the State in classifying such lands as not suitable for disposal cannot be held to be waiving its liens as the Commissioner of the General Land Office had hoped might be the case. Instead, the State must be found to be asserting its own right of ownership, the right which results from complete lien enforcement through forfeiture. But if the drainage homestead lands are not forfeited to the State, the remedial legislation does not apply to the lands and there is no right in the State to administer the lands in any way.

There can be no doubt that the Minnesota State government regards the legislation in question as applicable to United States lands when unredeemed for the statutory period. Although there is nothing in the three basic acts to indicate the legislature's intention concerning these lands, as distinguished from lands privately held, chapter 328 of the Laws of 1939 concerning the Red Lake Game

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Preserve contains evidence⁷ that the legislature in 1939 regarded the Red Lake Game Preserve Act of 1929 as applying to the drainage homestead lands and considered that the unredeemed Government lands had been forfeited to the State. In opinions of January 13 and 26, 1938, the Minnesota Attorney General held that the Government lands in question had been forfeited to the State and under these acts could be sold by it at "forfeited" sales if classified as agricultural or withheld from sale if classified as nonagricultural.⁸ In current correspondence with the General Land Office about drainage charges on lands now being sought for homestead entry, the county auditor of Lake of the Woods County says that the lands have been forfeited to the State.^{9a} In addition, the memorandum of the Division of Land Planning and Conservation of the General Land Office which was basic to the Commissioner's request for this opinion seems to assume with the Attorney General that the lands had been forfeited.

These assumptions, however, I find to be without validity. The delinquent public and Indian lands have not been forfeited to the State; the remedial legislation in question does not apply to these lands and the State has no authority over them save that derived from the Volstead Act of May 20, 1908. It is unnecessary here to labor these points. It is axiomatic that the disposition of the public domain lies within the exclusive jurisdiction of the Congress. The Congress alone has power to declare how the United States may be divested of its title. Nowhere has the Congress declared that the United States may be divested of its title to its public or Indian lands in Minnesota by operation of Minnesota's tax law or any other of its statutes.

⁷ L. 1939, ch. 328, amends L. 1935, ch. 210, which in turn implemented L. 1929, ch. 258, the act creating the Red Lake Game Preserve. The exact language of section 7 is as follows:

WHO MAY PURCHASE. Any parcel of land described in any such notice of sale may at any time not less than one week prior to the date of such sale be purchased at the appraised value thereof by the person who is *a bona fide Federal Entryman or Patentee of any such land or, by the person who was the record owner of the fee title thereto at the time the state became the absolute owner thereof.* [The italicized phrases constitute the new matter.]

Section 6, prescribing the contents of the notice of sale, requires the lands about to be sold to be described in the notice of sale as parcels—

which have been *forfeited to the state* for non-payment of taxes, and which have been classified as agricultural lands and appraised as provided by law. [Italics supplied.]

It is clear therefore that the phrase "*Federal Entryman * * * of any such land,*" appearing in section 7, can refer only to a Federal Entryman of public or Indian ceded lands of the United States Government which had been declared forfeited to the State and then been classified as agricultural lands, appraised and put up for sale. (Appendix II. *The Minnesota Legislature and Forfeiture of United States Lands.*)

⁸ For brief digests of these opinions see Mason's Minnesota Statutes, 1927, v. 3, 1940 Supp., sec. 5620-13½, footnotes.

^{9a} For a statement by the auditor of Lake of the Woods County see Appendix III.

The Volstead Act in numerous provisions shows affirmatively that it contemplates no transfer of the Government's title in the drained lands in any manner save by United States patent.

The Volstead Act, to be sure, is a reference statute and as such adopts Minnesota's drainage laws and its tax law machinery for collection of real estate taxes. But it adopts only such portions of Minnesota law as may be applicable and as may give force and effect to its own provisions. It adopts nothing that will be incompatible therewith.⁹ The act makes explicit provision as to when, how and to whom United States patent to the drained lands shall issue in the event of their sale for delinquent assessments. It therefore does not adopt the incompatible provisions of Minnesota tax law for issuance of Minnesota tax title and tax deeds to these lands. The act contains an unambiguous declaration that nothing in it shall be construed as creating any obligation on the United States to pay any of the drainage charges. Since thereunder the Government is in no sense a debtor for the drainage liens, it would be absurd as well as inconsistent with the declaration to construe the statute as adopting a Minnesota forfeiture law divesting the Government of its title for nonpayment of a nonexistent debt.

But no such nullification could in fact have been contemplated or effected. The Volstead Act adopts only the Minnesota law existing at the time of the adoption (May 20, 1908). No subsequent legislation whether of amendment or repeal alters that adoption. The Supreme Court rule on this point has been clear for a hundred years and in the interpretation of Federal laws is controlling.¹⁰

On May 20, 1908, when the Volstead Act was approved, Minnesota law did not permit forfeiture of unredeemed lands to the State. Hence there was no forfeiture law to be adopted. Nineteen years later chapter 119 of the Laws of 1927 amended the tax law to provide for absolute forfeiture to the State of lands bid in by it at the annual tax judgment sale and remaining unredeemed at the expiration of five years from such sale. But under the Federal rule this subsequent

⁹ *Gillesby v. Board of Commissioners of Canyon County*, 107 Pac. 71, 74 (Idaho, 1910); 1 Lewis' Sutherland Statutory Construction (2d ed.) sec. 6; 2 *idem*, sec. 405; *State v. Board of Commissioners of Marion County*, 85 N. E. 513, 521 (Ind., 1908); *State v. Board of Commissioners of Shawnee County*, 110 Pac. 92, 94 (Kansas, 1910); *State v. Tausick*, 116 Pac. 651, 657 (Wash., 1911); *Gadd v. McGuire*, 231 Pac. 754, 763 (Calif., 1924).

¹⁰ *Kendall v. United States*, 12 Pet. 522, 624 (1838); *In re Heath*, 144 U. S. 94 (1892); *Postal Telegraph Cable Co. v. Southern Ry. Co.*, 89 Fed. 190, 194 (1898); *Interstate Railway Co. v. Massachusetts*, 207 U. S. 79, 84 (1907); *Panama Railroad Co. v. Johnson*, 264 U. S. 375, 391-2 (1924); *Engel v. Davenport*, 271 U. S. 33, 38 (1926); *United States v. McMurtry*, 5 F. Supp. 515, 517 (1933); *Munoz v. Porto Rico Railway Light and Power Co.*, 83 F. (2d) 262 (1936); *United States v. Mercur Corporation*, 83 F. (2d) 178, 180 (1936); *State v. Hyde*, 169 Pac. 757, 762 (Ore., 1918).

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change, even if compatible with the Volstead Act, could in nowise affect the adoption already made thereby.¹¹

Since therefore no congressional authorization of forfeiture of public or Indian lands to the State is to be read into the Volstead Act, it follows that the remedial conservation legislation above described, based as it is on the principle of forfeiture, has no applicability to the drained homestead lands of the United States and can give the State no authority over them. In so far then as these statutes are concerned, the liens remain unimpaired and can still be enforced but only under the Volstead Act. Further, until issuance of United States patent in accordance with its terms or with those of other applicable public land laws the title to these lands remains in the United States and no act of the Minnesota Legislature or expression of opinion by any executive officer of the State can operate to divest it.

In the course of the examination just made I have inquired further into the larger problem of the General Land Office concerning the relation of the Volstead Act to homestead entry and the legality of withdrawing the drainage homestead lands from such entry. Comprehensive analysis of the Volstead Act and comparison of it with parallel statutes for the reclamation of arid lands have led me to the conclusion that there is no legal barrier whatever to prevent withdrawal of any of these Volstead lands, either public or Indian, from homestead entry.

Perusal of the records of the 30 years of the Volstead Act shows a number of Executive orders issued during that period under the authority of the Withdrawal Act of June 25, 1910 (36 Stat. 847). These orders withdrew "unreserved and unappropriated" lands in Minnesota from all forms of disposition, subject to existing valid rights. Practically without exception the General Land Office has held, at times with the support of the Department, that these orders did not withdraw the lien-burdened lands from homestead entry inasmuch as the lands were not unappropriated lands. The drainage liens, it was said, constituted an appropriation of the lands by the State and therefore a valid right barring any withdrawal from homestead entry.

Implicitly, this ruling assumes (1) that a lien is an appropriation; (2) that the State has authority to make an appropriation of these lands; and (3) that the right created in the State by this appropriation is a right to the continuance of homestead entry. These assump-

¹¹ Failure to apply this rule seems to have been the reason for a number of erroneous conclusions observed throughout the record.

tions overlook several important considerations. In the first place, no lien is or can be an "appropriation." The nature of a lien is wholly incompatible with the idea of appropriation, title or ownership in one who holds a lien. All the authorities are agreed that the term "lien" never imports more than security. In equity it is neither a *jus in re* nor a *jus ad rem*. It is not a property in the *res* itself nor does it constitute a right of action for the *res*. It constitutes rather a charge upon the *res*. As such it is a right, as here, to have the *res* sold or otherwise applied in satisfaction and discharge of a debt or duty, a right incumbering the land and running with it in any change of ownership. No one therefore may have a lien on that of which he is himself proprietor. If he become the proprietor of that on which he has a lien, his lien as lien is extinguished, becoming merged in his general property in the *res* acquired.¹²

The Volstead Act conforms with these principles. In permitting the State to impose a lien on these lands, the act intends merely to give the State such security as a lien may be worth, not a right in the lands but a mere security mechanism whereby the State may hope to reimburse itself from some future beneficiary of the drainage for moneys paid out therefor.

In the second place, neither the Volstead Act nor the Minnesota tax law adopted by it permits the State to "appropriate" the lien-burdened lands. The Volstead Act requires that whoever obtains these lands shall have the qualifications which a homestead entryman must have and accordingly be a natural person.^{12a} The Minnesota tax law as adopted does not permit the State to appropriate lien-burdened lands at any point in its tax enforcement proceedings, either when lands unsold at a tax judgment sale are bid in for it or when they fail of redemption within the statutory period.^{12b} Obviously, then, the lien works no appropriation and the locus of such right as the State may have to bar withdrawal must be sought elsewhere.

¹² 19 Amer. & Eng. Enc. Law 2d ed. pp. 6, 11; 2 Bouvier Law Dict., Rawle's Third Edition, p. 1978; Story, Eq. Jur. secs. 506, 1215; Pomeroy Eq. Jur. secs. 165, 167, 1233, 1234, especially footnote 5; Words and Phrases, Permanent Edition, v. 25, Lien; see also Mr. Justice Story in *Ex parte Foster*, 9 Fed. Cases, 508, 513, 514 and leading English cases cited; 10 R. C. L. p. 141, sec. 123; *State Bank of Decatur v. Sanders*, 170 S. W. 86, 89, 114 Ark. 440; *In re Big Blue Mining Co.*, D. C. Calif., 16 F. Supp. 50, 52; *Ingles v. Bringham*, 1 Dall. 341, 345, 1 L. ed. 167; *Donohue v. Stearns*, 17 N. W. 381, 31 Minn. 244; *Seaboard All-Florida Ry. v. Leavitt*, 141 So. 886, 889; *Morrison v. Clarksburg Coal & Coke Co.*, 43 S. E. 102, 106, 52 W. Va. 331; *The Poznan*, 9 F. (2d) 838.

^{12a} Par. 2, General Land Office Instructions of February 29, 1912, 40 L. D. 438-9; and Par. 4 of Instructions of April 24, 1913, 42 L. D. 104-5.

^{12b} See House debate on Volstead Act, Congressional Record, v. 42, pp. 4988-4992, especially p. 4991. See Minnesota Revised Laws 1905, section 928; also General Statutes of Minnesota, 1913, section 2117, footnote 4; *Mulvey v. Tozer*, 40 Minn. 384, 42 N. W. 387, 388 (1889). Rev. Laws 1905, sec. 936; amended by General Laws 1907, c. 430, sec. 1, p. 612 (Gen. Stats. 1913, sec. 2127); *State ex rel. Shaw v. Scott*, 105 Minn. 69, 117 N. W. 417 (1908); *Minnesota Debenture Co. v. Scott*, 106 Minn. 32, 119 N. W. 391 (1908); *Rupley v. Fraser*, 132 Minn. 311, 156 N. W. 350, 352 (1916).

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In the third place, the Volstead Act sets up a security system which is entirely independent of homestead entry and its continuance. It enables the State both to dispense with a homestead entryman when necessary and to get along without any at all. The system authorizes the State to collect drainage charges from an entryman if there be one but it also provides for offsetting his delinquencies if he be irresponsible and for effecting his ouster if he fail to redeem his holding from a tax judgment sale for unpaid charges. What is more important from the point of view of the State, the system functions also upon unentered lands, on which of course there is no entryman at all. Unlike the 1916 statute promoting the reclamation of arid lands,¹³ the Volstead system does not make homestead entry of lands a condition precedent to the State's collection of drainage assessments but provides a Volstead substitute for a homestead entryman.

This significant part of the system allows drainage assessments against unentered lands to become liens as soon as recorded and to become enforceable in normal course by the public tax judgment sales or by the private sales, or State assignments, under the State tax law. Then, since the State has no power to give to the tax sale purchaser of United States lands the certificate of tax title in fee which it would issue in the case of lands privately owned, the Volstead system gives to such purchaser as may appear the right to obtain the lands by United States patent instead. Since there is no delinquent entryman to be considered, the purchaser does not have to await the expiration of a redemption period before seeking patent. Nor is he required to live on the land for any statutory period before acquiring it. He may obtain his patent to unentered land immediately after making his tax lien purchase. He need only offer proof of that purchase and make to the United States the payments due to it under the act. Section 5, act of May 20, 1908 (35 Stat. 169).

However, the right thus to seek patent is not of indefinite duration. The lien purchaser may be a speculator in tax sales. Not really desirous of acquiring the lands, he may fail to seek patent. In order therefore that the State may have recourse to someone who actually desires the lands, the act limits the life of the lien purchaser's right to 90 days. If within that period the tax sale purchaser shall not seek United States patent, the act authorizes any qualified person complying with its financial requirements to be subrogated to that purchaser's right to obtain patent. *Ibid.*, section 6.

Thus by adoption of appropriate parts of the State tax collection law and by express provisions of its own for patent and for subroga-

¹³ The act of August 11, 1916 (39 Stat. 506).

tion, the Volstead Act enables the State to offer some inducement to the public to buy the drainage liens on unentered public lands and so to attract to the land responsible debtors who will pay not only current drainage charges but future taxes as well.

It also results under these provisions that such a responsible debtor or ultimate patentee of unentered lands must be one of four persons as follows:

1. A purchaser at a public tax judgment sale; or
2. A subrogee to the rights of such purchaser, if the latter fail to seek patent from the United States within the prescribed period; or
3. A purchaser at a private sale from the State, commonly called a State assignee, of unentered lands bid in for the State at the public tax judgment sale, there having been no actual purchasers at such public sale; or
4. A subrogee to the rights of such State's assignee, if the assignee fail to seek patent from the United States within the prescribed period.

As to the qualifications of any such patentee, the act requires only that he shall have the qualifications which a homestead entryman must have. But the effect of that requirement, it should be emphasized, is merely to define the would-be patentee's qualifications *by reference* to homestead law. Neither this reference nor the 160-acre limitation on the quantity of land which he may buy makes this qualified person into a homestead entryman.

Nor does this purchaser have any interest in homestead statutes or any rights under them. His right to patent as above described springs from the Volstead Act alone, from its express terms and from such parts of the State drainage and tax laws as are properly incorporated into the Volstead Act by reference and adoption under the Federal rule. It is a right to acquire unentered public lands in Minnesota by a method which is entirely independent of and different from that under any other public land law contemplating private appropriation of public lands. It is a right to *Volstead* purchase, *Volstead* entry, *Volstead* patent, earned not by *homestead* residence and improvements but by *Volstead* purchase of the State's drainage liens.

This Volstead system just described, although thus serving the individual, is designed primarily of course in the interest of the State. It is intended to bring to unentered lands the responsible landholder without whom the State's inchoate lien must remain a ghost obligation, seen in the law but eluding the grasp.¹⁴ It is expected to

¹⁴ See Mr. Justice Holmes on unenforceable liens in *The Western Maid*, 257 U. S. 419, 433; also Clark, C. J., in *Nelson v. Atlantic Coast Line Railroad Company Relief Department*, 147 N. C. 103, 60 S. E. 724.

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find the patentee without whom the State cannot extend its tax structure to the drained lands of the United States and exercise unrestricted tax control over them.

In giving the State this viable means of security, the Congress necessarily contemplates the operation and completion of the whole process through the operation and completion of each of its procedures, beginning with adoption of a drainage project by the State and culminating in issuance of Volstead patent by the Federal Government. Obviously the State's interest is as much bound up in the demand right¹⁵ of its tax sale purchaser or his subrogee to the issuance of United States patent as in its own privilege right to conduct a drainage operation, impose a lien or hold a tax sale unhindered by the United States Government. Indeed United States tolerance of the State's performance of the acts mentioned would be of little worth if in the end the United States were to refuse to issue patent to the State's tax sale purchaser. Denial of patent would dishonor the State's tax sale, impair contract obligations to the tax sale purchaser and defeat consummation of the State's security.

Implicitly therefore the act gives to the State a right to this complete operation of the system in all its parts. To the Government it assigns an equivalent duty to refrain from interference with the State's exercise of its privilege rights and to issue Volstead patent when the demand right of the State is asserted through application for patent by a qualified tax sale purchaser. The act therefore gives to the State as well as to its tax sale purchaser a right to United States disposition of the lands under the Volstead Act by Volstead patent when the statutory conditions are met.

Rights to a particular form of disposition of public lands except the lands to which they attach from withdrawal from that form of disposition. They do not bar withdrawal of the lands from any other form of disposition under the public land laws. It has been demonstrated that the rights of the State of Minnesota and its lien purchaser under the Volstead Act are not rights to homestead entry. It has been shown that these rights are to Volstead disposition of the lands and to that alone. These rights will therefore except the lands to which they are asserted from withdrawal from Volstead disposition. They will not bar withdrawal of the lands from homestead entry or any other form of disposition under the public land laws.

It may be considered established therefore that nothing in the Volstead Act prevents unentered public or Indian ceded lands which have been sold for drainage charges or merely assessed therefor from

¹⁵ See "A Restatement of Hohfeld" by Max Radin, 51 Harv. L. Rev., pp. 1141-1164.

being withdrawn from homestead entry. It remains only to determine whether any obstacle elsewhere existing prevents the attachment of the withdrawal of February 5, 1935, to public lands or the withdrawals of September and November 1934 to Indian Lands.

In the case of the public lands concerned there seems to be nothing to prevent immediate attachment of the Executive order of February 5, 1935 (No. 6964), other than such prior withdrawals as may have attached and not yet been revoked. If the tract books disclose any such,¹⁶ made subject to existing valid rights, they may properly be considered as having withdrawn the public lands from every form of disposition, including homestead entry, except that of Volstead patent unless the withdrawal was effected before initiation of the State's right by adoption of a drainage project on the lands concerned. Upon the revocation of any such withdrawal, that of February 5, 1935, is to be regarded as at once attaching and as having similar effect.

In the case of the Indian ceded lands the departmental orders of September 19 and November 2, 1934 (54 I. D. 559-564), were intended to withdraw from disposition of any kind all undisposed of ceded lands that had been opened or authorized to be opened to any form of disposition under the public land laws or that were subject to mineral entry and disposition under the mining laws, pending appropriate consideration of the question of their permanent restoration to tribal ownership. The withdrawals were designed to prevent the initiation of new claims which might obstruct or prevent the restoration but were to be subject to existing valid rights. Hence if lawful these withdrawals would bar homestead entry but not Volstead patent.

It appears¹⁷ that in 1934 the only ceded lands in Minnesota which had been opened and which remained undisposed of were lands ceded under the authority of the Nelson Act of January 14, 1889 (25 Stat. 642). That cession followed the pattern of "relinquishment in trust"¹⁸ under which the Government holds the naked fee in trust, the ceded lands being subject to sale by the Government for the

¹⁶ The Executive order of December 3, 1928 (No. 5003), appears to be still in effect. This withdrew the public lands in certain townships in the counties of Koochiching and Lake of the Woods from settlement, entry or other disposition, subject to prior valid rights legally initiated and maintained, in order to effectuate the provisions of the act of May 22, 1926 (44 Stat. 617), for carrying into effect the convention between the Governments of the United States and Great Britain concluded February 24, 1925, for regulation of the level of the Lake of the Woods.

¹⁷ See tables of opened lands and acts under which they were opened in the 1934 withdrawal orders, 54 I. D. 561 and 564.

¹⁸ Cohen, *Handbook of Federal Indian Law*, ch. 15, sec. 21, Status of Surplus and Ceded Lands, p. 334.

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benefit of the Indians but only in the manner and for the purposes provided for in the act.

Concerning the Nelson Act the courts have held that the ceded lands remained Indian lands appropriated to the purposes of an express trust and therefore were not to be disposed of except in the manner specified in the act. *Minnesota v. Hitchcock*, 185 U. S. 373, 398-9 (1902); *White v. Wright et al.*, 83 Minn. 222, 86 N. W. 91 (1901); *Cathcart v. Minnesota and Manitoba Railroad Co.*, 133 Minn. 14, 157 N. W. 719 (1916); *Ash Sheep Co. v. United States*, 252 U. S. 159 (1920). Accordingly, the Executive of and by its own general powers would be without authority to withdraw these lands from the disposition authorized by the act¹⁹ for purposes inconsistent therewith. Hence unless the proposed restoration to tribal ownership could be reconciled with the express purposes of the Nelson Act the departmental orders would have to fall as regards these Chippewa lands.

The question of consistency however need not be discussed here, for in considering the restoration of these lands to tribal ownership the Department is acting under an express authorization²⁰ by the Congress and the Congress has been held not to be bound to the terms of the Nelson Act in its administration of the ceded lands. The courts have said that the Congress did not intend by the Nelson Act to abandon its guardianship of the Indians here concerned or to establish a conventional trust of lands and funds which would be beyond its own power to control. They hold that the Congress has retained undiminished plenary power over both the lands ceded and the funds realized and that in exercising the powers of a guardian and of a trustee in possession it may make such changes in the management and disposition of the tribal property as it deems necessary to promote the Indians' welfare. *Morrison v. Work*, 266 U. S. 481, 483, 485 (1925); *Chippewa Indians of Minnesota v. The United States*, 88 Ct. Cl. 1 (1938); *idem.* 307 U. S. 1 (1939).

There can be no question therefore that the hands of the Congress were not tied by the so-called express trust of the Nelson Act and that the Congress retained power to depart from the plan envisaged therein and to authorize restoration of the ceded lands to tribal ownership. Such a departure it made by section 3 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), enacted to con-

¹⁹ All lands other than pine lands were classified as agricultural and were to be disposed of to actual settlers only under the provisions of the homestead law upon payment of a statutory price per acre in five equal annual installments and proof of five years' occupancy. Act of January 14, 1889 (25 Stat. 642), sec. 6.

²⁰ Section 3 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984).

serve and develop Indian lands and resources and to accomplish other ends, section 3 containing the following provision:

The Secretary of the Interior, if he shall find it to be in the public interest, is hereby authorized to restore to tribal ownership the remaining surplus lands of any Indian reservation heretofore opened, or authorized to be opened, to sale, or any other form of disposal by Presidential proclamation, or by any of the public-land laws of the United States: *Provided, however*, That valid rights or claims of any persons to any lands so withdrawn existing on the date of the withdrawal shall not be affected by this Act: *Provided further*, That this section shall not apply to lands within any reclamation project heretofore authorized in any Indian reservation: * * *.

The express authority here given the Secretary of the Interior to effect a restoration should he find it in the public interest to do so necessarily gives him implicit authority to safeguard a prospective restoration while making his findings. This public purpose of protecting the restoration, it has been administratively determined, the Secretary may serve by temporary withdrawal of the lands in question as "public" lands under the act of June 25, 1910 (36 Stat. 847), relating to withdrawals of *public* lands.²¹

I find therefore that the provisions of the Indian Reorganization Act above quoted freed the Executive from the restrictions imposed by the Nelson Act as above pointed out; that the departmental withdrawals of September 19 and November 2, 1934, were lawful and valid as regards the Chippewa lands; and that they withdrew these lands from homestead entry and from every other form of disposition, subject only to the valid rights to Volstead patent existing in the State of Minnesota and its qualified tax sale purchasers or those properly subrogated to their rights.

In summary, therefore, for all the considerations above set forth, I am of opinion,

First, that the Minnesota drainage relief statutes concerning which the Commissioner of the General Land Office has inquired neither waive the State's liens imposed on United States lands under the Volstead Act nor apply at all to these lands;

Second, that the State authorities erroneously regard the United States lands as forfeited to the State for nonpayment of the drainage charges;

Third, that the only form of disposition of public and Indian ceded lands to which the State and those claiming under it acquire rights under the Volstead Act is Volstead disposition and Volstead patent; and

²¹ Memorandum, Solicitor to Secretary, September 17, 1934. See also section 4 of act of March 3, 1927 (44 Stat. 1347); and Cohen, *Handbook of Federal Indian Law*, ch. 15, section 21, Status of Surplus and Ceded Lands, p. 336.

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Fourth, that the Executive order of February 5, 1935, and the departmental orders of September 19 and November 2, 1934, withdraw, respectively, the public and the Indian ceded lands here concerned from homestead entry and every other form of disposition under the public land laws subject only to valid rights to Volstead patent existing in the State of Minnesota and the qualified persons claiming under it.

Accordingly, any previous contrary determination is hereby overruled.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

STATE AND FEDERAL JURISDICTION OVER COUNTY ROADS WITHIN THE ROCKY MOUNTAIN NATIONAL PARK

Opinion, August 17, 1942

NATIONAL PARKS—JURISDICTION—COUNTY ROADS—SALE, CONVEYANCE AND MAINTENANCE THEREOF.

The National Park Service has no police jurisdiction over county roads until title thereto is acquired by the Government and jurisdiction is ceded or consented to by the State. A sale and conveyance comprehends a transfer for valuable considerations such as benefits and advantages that will accrue to the inhabitants of the county. The United States is not authorized to regulate and maintain highways not owned by the Government.

COHEN, *Acting Solicitor*:

The County of Larimer, Colorado, has presented a conveyance to the United States of county roads in the territory added to the Rocky Mountain National Park¹ by proclamations of the President dated January 11, 1932, and March 5, 1936.² A resolution of the board of commissioners of Larimer County is submitted with the deed which sanctions the transfer of jurisdiction and control of the roads to the Government. These three questions have been presented for my consideration and opinion:

1. Has the United States concurrent or exclusive police jurisdiction over the public highways on and across lands added to the Rocky Mountain National Park by Presidential proclamations of January 11, 1932, and March 5, 1936?
2. If the answer to the first question is in the negative, will the acceptance by this Department of the quit-claim deed tendered by the County of Larimer, Colorado, dated November 5, 1941, authorize the Federal Government to police

¹ Established by act of January 26, 1915 (38 Stat. 798, 16 U. S. C. 191).

² Pursuant to the act of June 21, 1930 (46 Stat. 791, 16 U. S. C. sec. 192b).

and maintain such highways within the boundaries of Rocky Mountain National Park?

3. If the answer to the second question is in the negative, what action is necessary on the part of Larimer County or the State of Colorado in order that the Department of the Interior may expend National Park Service roads and trails funds in the maintenance of such roads and regulate traffic thereon?

My answer to the first question is that the National Park Service has no police jurisdiction at the present time over the highways under consideration. It appears that Colorado by act of its legislature approved February 19, 1929,³ ceded exclusive jurisdiction to the United States over all land included within the Rocky Mountain National Park. This cession was accepted by Congress by the act of March 2, 1929.⁴ The lands added to the park by the President's proclamations of 1932 and 1936 were not a part of the park at the time the State ceded jurisdiction to the Government. By the terms of the act ceding jurisdiction to the United States, only lands included within the park at that time were affected. It therefore follows that added lands are still under the ownership, control and police jurisdiction of the county.

With respect to the second question, the deed cannot be accepted until it is established that the county has valid title to the highways. Satisfactory evidence of the county's title to the highways should be submitted for my consideration and opinion.

The validity of the proposed conveyance depends further upon the power of the State to convey, and of the United States to accept, land used for highway purposes. The governing Federal statute authorizes the acceptance of "donations"; the governing State statute authorizes "sale and conveyance" of these lands. If there is an unsurmountable inconsistency between these statutes the proposed transaction cannot be approved. I am of the opinion, however, that these categories are not necessarily contradictory. There may be times when a conveyance is neither a sale nor a donation.⁵ Conversely, the categories of sale and donation may overlap so that a conveyance, as in the circumstances under consideration, is both a sale and a donation, within the meaning of specific statutes.

The act of June 5, 1920,⁶ empowers the Secretary to accept rights-of-way over lands within the national parks which may be donated for park purposes. Clearly this statute was not intended to prevent conveyances where the conveyor receives indirect benefits from the conveyance; the intent of the statute is given full scope if a con-

³ Ch. 168, sec. 33, Colo. Stat. Ann. (1935).

⁴ 45 Stat. 1536, 16 U. S. C. sec. 198.

⁵ *Green v. Thomas*, 37 Ohio App. 489, 175 N. E. 226 (1930).

⁶ 41 Stat. 917, 16 U. S. C. sec. 6.

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veyance of this type is considered a donation. The conveyance⁷ from the county to the Government may therefore be considered as a donation within the meaning of that act because it is free from any monetary consideration.

The county is authorized by statute⁸ to "sell and convey any real or personal estate owned by the county, and make such order respecting the same as may be deemed conducive to the interests of the inhabitants." If this conveyance is not a "sale and conveyance," in so far as the county is concerned it is unauthorized. In my opinion if the county will receive adequate considerations other than money it may legally convey the title to the highways. In addition to the maintenance of the highways by the Government with funds appropriated by the 1943 Appropriation Act for this Department (Act of July 2, 1942, 56 Stat. 506) the inhabitants of the county will enjoy the convenience, recreation and pleasure that will accrue to them through the use of the Government highways leading to the park. These are valuable considerations⁹ for the conveyance and I think render it a "sale and conveyance" within the meaning of the State statute. In the language of the State statute, such considerations "may be deemed conducive to the interests of the inhabitants." In discussing the meaning of the word "sale" the court in *Halsted v. Globe Indemnity Co.*, 258 N. Y. 176, 179 N. E. 376, citing *Hudson Iron Co. v. Alger*, 54 N. Y. 173, said: "In its broadest sense a 'sale comprehends any transfer of property from one person to another for a valuable consideration.'" Accepting this broad definition of sale, we recognize the proposed transaction as one by which the county would be selling the land to the United States.¹⁰

The power of the county commissioners with respect to the proposed transaction is clear. The county commissioners, under Colorado statute,¹¹ have the power to lay out, alter or discontinue any road running through any county. The board of commissioners by the resolution which accompanies the deed cedes and transfers to the Government such jurisdiction and control as the county possessed. That action is in effect an abandonment of the roads.

⁷ Recorded in Larimer County on November 10, 1941, in Book 733, page 593.

⁸ Chap. 45, sec. 3, Colo. Stat. Ann. (1935).

⁹ Cf. *Green v. Thomas*, *supra*.

¹⁰ See *Roberts v. Northern Pacific Railroad*, 158 U. S. 1, 18 (1895); also *Stanley v. Schwalby*, 162 U. S. 255, 276, in which the court said: "A valuable consideration may be other than the actual payment of money, and may consist of acts to be done after the conveyance. *Prewitt v. Wilson*, 103 U. S. 22; *Hitz v. Metropolitan Bank*, 111 U. S. 722, 727; 4 Kent Com. 463; Dart on Vendors (6th ed.) 1018, 1019. The advantage enuring to the city of San Antonio from the establishment of the military headquarters there was clearly a valuable consideration for the deed of the city to the United States."

¹¹ Chap. 45, sec. 25, Colo. Stat. Ann. (1935).

Although the power of the county commissioners in this case is clear, the attempted exercise of that power which appears on the record is unsatisfactory. The resolution of the highway commissioners purports to impose on the Federal Government the obligation "to maintain" the highway. The word "maintain" has been construed to mean: "Keep in repair and replace."¹² It is unlawful for a Government officer to make a bargain which attempts to bind the Government beyond the appropriation for the fiscal year in which it is made.¹³ The Supreme Court has held that contracts that run beyond the fiscal year are unenforceable against the United States after the year in which they are made if that year's appropriation has been exhausted.¹⁴ A new deed should be recorded eliminating the consideration of maintenance on the part of the Government noted in the deed, *supra*. Instead of that consideration the deed should recite the benefits and advantages that will accrue to the inhabitants of the county as a result of the use of the highways by them and the maintenance of the roads to the extent that appropriated funds are available for this purpose. A new resolution should also be obtained ratifying and confirming the delivery of the supplemental deed for the considerations therein recited.

Before the acceptance of the deed, the United States is not authorized to regulate and maintain the highways in question. The expenditure of public funds on lands not owned by the Government may not be approved by the Comptroller General.¹⁵ Colorado statutes provide that the United States may obtain exclusive jurisdiction by consent to the "acquisition" of lands for any purposes of the Government,¹⁶ or by cession of jurisdiction to the United States of such lands.¹⁷ It should be observed that the acquisition of land is a prerequisite to the cession of jurisdiction by the State of Colorado under these statutes. When valid title to the highways is acquired by the Government, the deed accepted and jurisdiction ceded or consented to by the State of Colorado, the Federal Government will be

¹² *City of Denver v. Denver City Cable Railway Co.*, 22 Colo. 565, 45 Pac. 439.

¹³ Solicitor's Opinion, July 15, 1942, *supra*, p. 24.

¹⁴ *Goodyear Tire & Rubber Co. v. United States*, 276 U. S. 287 (1928); *Leiter v. United States*, 271 U. S. 205 (1926).

¹⁵ 19 Comp. Gen. 528, 529, *cf.* 18 Comp. Gen. 463.

¹⁶ Chap. 168, sec. 2, Colo. Stat. Ann. (1935).

¹⁷ Chap. 168, sec. 3, Colo. Stat. Ann. (1935). Secs. 2 and 3, *ibid.*, together with the resolution of the County Board of Commissioners were held sufficient to cede to the Federal Government such jurisdiction and control as the State possessed over the highways in the park now under consideration. *Robbins v. United States*, 284 Fed. 39, 45.

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authorized to maintain and exercise police jurisdiction over the highways within the boundaries of the Rocky Mountain National Park.¹⁸

The third question has been discussed in the reply to the first two questions and further comment upon this question is therefore unnecessary.

Approved:

ABE FORTAS,

Under Secretary.

CONDEMNATION OF RESTRICTED ALLOTTED LANDS OF THE FIVE CIVILIZED TRIBES

Opinion, August 24, 1942

RESTRICTED INDIAN LANDS—FIVE CIVILIZED TRIBES—CONDEMNATION—CONGRESSIONAL AUTHORIZATION—UNITED STATES—INDISPENSABLE PARTIES—CONSENT TO CONDEMNATION—ACT OF MARCH 3, 1901.

Authorization by Congress is a prerequisite to the valid condemnation of Indian lands restricted against alienation. The United States is an indispensable party to condemnation proceedings against the restricted lands of Indians of the Five Civilized Tribes. If Congress has authorized the condemnation of Indian lands it has also consented to suits against the United States in such cases subject to any condition which Congress sees fit to impose. The consent of the Secretary of the Interior is not essential to the maintenance of condemnation proceedings against lands of Indians of the Five Civilized Tribes under the act of March 3, 1901 (31 Stat. 1084).

RESTRICTED INDIAN LANDS—CONDEMNATION—PERMANENT LEGISLATION—STATEHOOD—REPEAL—ACT OF MAY 27, 1908.

Section 11 of the Curtis Act of June 28, 1898 (30 Stat. 495), the act of February 28, 1902 (32 Stat. 43), and section 25 of the act of April 26, 1906 (34 Stat. 137), relating to the condemnation of lands of Indians of the Five Civilized Tribes constitute permanent legislation continued in force after the admission of Oklahoma into the Union by the Oklahoma enabling act of June 16, 1906 (34 Stat. 267), if not by the terms of the acts themselves. The act of March 3, 1901 (31 Stat. 1084), upon the admission of Oklahoma into the Union on November 16, 1907, became available as authority for the condemnation of lands allotted to Indians of the Five Civilized Tribes except in so far as authority to condemn allotted lands had been furnished by the acts of June 28, 1898, February 28, 1902, and April 26, 1906, *supra*. The imposition of restrictions upon allotted lands of Indians of the Five Civilized Tribes by the act of May 27, 1908 (35 Stat. 312), did not repeal the authority for condemning such

¹⁸ *Camfield v. United States*, 167 U. S. 518, 525, 526; *Utah Power & Light Co. v. United States*, 243 U. S. 389, 404; *McKelvey v. United States*, 260 U. S. 353, 359; *Hunt v. United States*, 278 U. S. 96; *Surplus Trading Co. v. Cook*, 281 U. S. 647, 650; *James v. Dravo Contracting Co.*, 302 U. S. 134, 141, 142; *Robbins v. United States*, *supra*, which upholds this Department's police regulations in the Rocky Mountain National Park.

lands granted by the earlier acts. The provisions regarding eminent domain in the act of May 27, 1908, *supra*, did not limit the eminent domain authority previously granted.

RESTRICTED INDIAN LANDS—CONDEMNATION—COURTS—JURISDICTION—RIGHTS-OF-WAY—SECRETARIAL GRANT—TEMPORARY LEGISLATION.

In the absence of Congressional direction to the contrary, the Federal and not the State courts have jurisdiction over proceedings in condemnation of restricted Indian lands. Upon the admission of Oklahoma into the Union, the provisions of the act of March 3, 1901, *supra*, became available as authority for grants by the Secretary of the Interior of rights-of-way for public highways and for general telephone and telegraph business over lands of Indians of the Five Civilized Tribes. The provisions for section line highways contained in section 10 of the supplemental Creek agreement (32 Stat. 500), in section 37 of the Cherokee agreement (32 Stat. 716), and in section 24 of the act of April 26, 1906 (34 Stat. 137), were of temporary duration and not intended to survive the admission of Oklahoma into the Union.

RESTRICTED INDIAN LANDS—FIVE CIVILIZED TRIBES—RIGHTS-OF-WAY—INDIAN RESERVATIONS—ALLOTMENTS—JUDICIAL ACTION—OKLAHOMA WELFARE ACT.

The lands of the Five Civilized Tribes prior to allotment constitute Indian reservations and as such are subject to the acts of February 15, 1901 (31 Stat. 790), and March 4, 1911 (36 Stat. 1253), authorizing the Secretary of the Interior to grant rights-of-way for telephone, telegraph and transmission lines, etc. The applicability of those acts to lands allotted to Indians of the Five Civilized Tribes will be determined by pending litigation.* Lands acquired for Indian tribes under authority of section 1 of the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1937), became in effect Indian reservations and as such subject to the provisions of the acts of March 3, 1901, February 15, 1901, and March 4, 1911, *supra*.

COHEN, *Acting Solicitor*:

On January 4, 1940, you [Secretary of the Interior] referred to the Solicitor for an opinion certain questions concerning the laws and procedure governing condemnation of restricted lands allotted to Indians of the Five Civilized Tribes in Oklahoma. These questions arose out of efforts of the Grand River Dam Authority, then a public corporation and an instrumentality of the State of Oklahoma, to acquire by condemnation certain of the lands of these Indians for reservoir purposes. Since the acquisition of the lands needed by the Grand River Dam Authority was subsequently authorized by the act of June 11, 1940 (54 Stat. 303), the questions became moot in that particular case and the Commissioner of Indian Affairs was so advised by former Solicitor Margold on June 20, 1940.

In view of the limited scope of the act of June 11, 1940, and since questions concerning the authority under which the lands of Indians

* Decided February 15, 1943. *United States v. Oklahoma Gas Co.*, 318 U. S. 206. [Ed.]

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of the Five Civilized Tribes might be acquired for public purposes are constantly recurring, this office has undertaken a study of the applicable statutes and the departmental practices thereunder with a view to reaching some definite conclusion as to the appropriate legal procedure to be followed. The result of this study is given below.

1. *Condemnation.* The Five Civilized Tribes in Oklahoma comprise the Creek, Cherokee, Seminole, Choctaw, and Chickasaw nations. The lands of these nations were allotted in severalty to the individual members thereof under various allotment agreements entered into with the several nations and duly ratified by Congress.¹ The patents issued to the individual allottees under these agreements conveyed the fee simple title with restrictions against alienation. The restrictions so imposed, as modified by subsequent legislation,² have been extended to April 26, 1956, by the act of May 10, 1928.³ The effect of these restrictions is to restrain both voluntary and involuntary alienation, so that no interest can validly be acquired in the lands under the laws of the State, whether enacted in the exercise of its power of eminent domain or otherwise, without the sanction of Congress. The attitude of the courts is shown by the statement of the Supreme Court, speaking with reference to the attempt of an Oklahoma court to apply a State law so as to validate a lease of his restricted lands by a Cherokee Indian, in the case of *Bunch v. Cole*, 263 U. S. 250 (Okla. 1923) :

The power of Congress to impose restrictions on the right of Indian wards of the United States to alien or lease lands allotted to them in the division of the lands of their tribe is beyond question; and of course it is not competent for a State to enact or give effect to a local statute which disregards those restrictions or thwarts their purpose. *Tiger v. Western Investment Co.*, 221 U. S. 286, 316; *Monson v. Simonson*, 231 U. S. 341, 347; *Brader v. James*, 246 U. S. 88, 96; *Mullen v. Pickens*, 250 U. S. 590, 595.

The plenary power of Congress to legislate regarding Indians is admitted too generally to require further discussion now. It follows that any condemnation of restricted Indian lands must be authorized by Congressional enactments.

The need for enabling legislation by Congress also arises from the status of the United States as an indispensable party to the proceeding. As was stated by the Supreme Court in the case of *Minnesota*

¹ Cherokee agreement (32 Stat. 716) ; Choctaw and Chickasaw original agreement (30 Stat. 495) ; Choctaw and Chickasaw supplemental agreement (32 Stat. 641) ; Creek original agreement (31 Stat. 861) ; Creek supplemental agreement (32 Stat. 500) ; Seminole agreement (30 Stat. 567).

² See acts of April 26, 1906 (34 Stat. 137) ; May 27, 1908 (35 Stat. 312) ; April 12, 1926 (44 Stat. 239) ; and January 27, 1933 (47 Stat. 777).

³ 45 Stat. 495.

v. *United States*, 305 U. S. 382, 388 (1939), "A proceeding against property in which the United States has an interest is a suit against the United States." The Court also pointed out that not even a State can sue the United States until permission to do so has been granted. The United States clearly is an indispensable party when the legal title to the lands to be condemned is held by the United States in trust for the Indians. *Minnesota v. United States*, *supra*. The fact that the restricted lands of Indians of the Five Civilized Tribes are held in fee subject to restrictions against alienation does not call for a different rule. This was the view taken by the United States District Court for the Northern District of Oklahoma in several unreported cases of recent origin.⁴ In each of these cases the Grand River Dam Authority sought to condemn lands of Five Tribes Indians and asserted that the United States need not be joined as a party defendant. The United States attorney moved to dismiss on the ground, among others, that the United States is an indispensable party and should have been joined as a party defendant. The court said that this contention was correct and in each of its orders gave the counsel for the Grand River Dam Authority permission to amend the pleadings. The soundness of the ruling is not open to question.

The maintenance of the restrictions which Congress has imposed to prevent alienation of Five Civilized Tribes lands is distinctly an interest of the United States. *Privett v. United States*, 256 U. S. 201 (1921). The Supreme Court discussed this interest in the maintenance of restrictions in the case of *Sunderland v. United States*, 266 U. S. 226, 234 (1924), saying, "And the power does not fall short of the need; but, so long as they remain wards of the Government, justifies the interposition of the strong shield of federal law to the end that they be not overreached or despoiled in respect of their property of whatsoever kind or nature. *United States v. Kagama*, 118 U. S. 375, 383-4." The guardianship of the Government over the Indians did not cease when the allotments were made. *Bowling v. United States*, 233 U. S. 528 (1914). The entry of Oklahoma into statehood did not disturb the interests of the United States over the Indians for "Congress was careful to preserve the authority of the Government of the United States over the Indians, their lands and property, which it had prior to the passage" of the Oklahoma enabling act of June 16, 1906 (34 Stat. 267). *Tiger v. Western Investment Co.*, 221 U. S. 286 (1911). If the lands of an Indian have been improperly alienated, the United States can sue in his behalf; "the authority to enforce restrictions of this character is the necessary complement to the

⁴ *Grand River Dam Authority v. Kephart*, No. 263 Civil; *Grand River Dam Authority v. Landrum*, No. 322 Civil; *Grand River Dam Authority v. Barehead*, No. 329 Civil.

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power to impose them"; and the Government need not have a pecuniary interest in the controversy. *Heckman v. United States*, 224 U. S. 413 (1912). From the foregoing statements, it is apparent that the United States has a sufficient interest in proceedings looking toward condemnation of restricted Indian land, individual or tribal, to be an indispensable party to any such action.

The question as to whether authorization for condemnation carries with it a consent to be sued was affirmatively decided by the Eighth Circuit Court of Appeals in the case of *United States v. Minnesota*, 95 F. (2d) 468 (1938), but it was there held that permission is given to condemn a highway right-of-way under the act of March 3, 1901 (31 Stat. 1084), only if the Secretary of the Interior consents to the proceedings. On review, the Supreme Court did not discuss the necessity of consent by the Secretary, but as to the other point stated in a strong dictum that authorization to condemn implied a consent to be sued (305 U. S. 382, 388). In *United States v. Minnesota*, 113 F. (2d) 770, the Circuit Court of Appeals reconsidered its prior holding and ruled that Secretarial consent was not necessary for condemnation to lie under the act of 1901.

Prior to the admission of Oklahoma into the Union, the legislation enacted by Congress for the regulation of the affairs of the Five Civilized Tribes fell into two principal categories—legislation of a permanent and continuing nature, and legislation of temporary duration made necessary by the lack of an organized territorial government and not intended to be effective after statehood. The necessity for the latter type of legislation is well described by Mr. Justice Van Devanter in the case of *Southern Surety Co. v. Oklahoma*:⁵

By reason of the conditions arising out of the presence of the Five Civilized Tribes no organized territorial government was ever established in the Indian Territory. Up to the time it became a part of the State of Oklahoma it was governed under the immediate direction of Congress, which legislated for it in respect of many matters of local or domestic concern which in a State are regulated by the state legislature, and also applied to it many laws dealing with subjects which under the Constitution are within Federal rather than state control. In what was done Congress did not contemplate that this situation should be of long duration, but on the contrary that the Territory should be prepared for early inclusion in a State. * * *

In the Oklahoma enabling act⁶ Congress took cognizance of both types of legislation and indicated that which was or was not to survive statehood by declaring:

⁵ 241 U. S. 582, 584 (1916).

⁶ Act of June 16, 1906 (34 Stat. 267).

and the laws of the United States not locally inapplicable shall have the same force and effect within said State as elsewhere within the United States.

Condemnation legislation of a permanent nature continued in force by the foregoing declaration, if not by the terms of the legislation itself, is found in section 11 of the act of June 28, 1898 (30 Stat. 495), the act of February 28, 1902 (32 Stat. 43), and section 25 of the act of April 26, 1906 (34 Stat. 137). The 1898 act, commonly referred to as the Curtis Act, granted authority in section 11 to towns and cities organized within the Indian Territory to take by condemnation lands necessary for public improvements "regardless of tribal lines." The act of 1902 granted to railroads operating within the Indian Territory authority to take by condemnation any lands necessary for their purposes. Section 25 of the act of 1906 empowered light, or power companies to condemn lands within the Indian Territory for certain enumerated purposes. This statute accomplished several things: First, Congress extended the authority for condemnation previously granted to towns and cities and railroads to light or power companies and enumerated the uses of the land which were to be considered as public in purpose; second, it established the means by which the land could be obtained without litigation; third, it extended the procedure set out in the February 28, 1902 act to condemnation proceedings which might be necessary; and fourth, it provided that when the Indian Territory became subject to the control of a Territory or State that the rights granted to the light or power company would be under the control of that Territory or State. The authorization, as in the other acts, extended to the taking of both tribal and allotted lands.

With respect to the procedure, condemnation proceedings under the act of 1898 were originally conducted under the laws of Arkansas; but the Oklahoma enabling act, in sections 13 and 21, extended the laws of the Territory of Oklahoma to Indian Territory until such time as the State laws were enacted. The act of 1906, in the final proviso of section 25, stated that all rights granted under that section were to be "subject to the control of the future Territory or State within which the Indian Territory may be situated." Whether the procedure under the 1902 railroad act also became subject to State laws is a question now moot since the act of May 27, 1908 (35 Stat. 312), discussed below, specifically continued in force sections 13 to 23, inclusive, of the 1902 statute.

The only law of the United States which provided generally for the condemnation of Indian lands and which it is necessary to consider in connection with section 21 of the enabling act is found in

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the second paragraph of section 3 of the act of March 3, 1901 (31 Stat. 1084, 25 U. S. C. sec. 357), and provides:

That lands allotted in severalty to Indians may be condemned for any public purpose under the laws of the State or Territory where located in the same manner as land owned in fee may be condemned, and the money awarded as damages shall be paid to the allottee.

At the time the act was passed it could not apply immediately to Five Civilized Tribes lands since no Territory or State then included Indian Territory within its boundaries and without such a government to determine the public purposes for which condemnation could be used the authority was useless. However, if Congress did not intend for the 1901 act to be inapplicable to Five Civilized Tribes lands after the State of Oklahoma had been formed, the enabling act and the admission of the State made the provision available for the condemnation of allotments of Indians of the Five Civilized Tribes.

At the time the act of March 3, 1901, was passed the lands of the Five Tribes Indians in Indian Territory were in tribal ownership, and were, except for certain Federal control, subject to the government of the respective nations. On March 3, 1893 (27 Stat. 612, 645), Congress had indicated its intention to place these areas under a territorial or State government, notwithstanding guarantees to the contrary given in some of the treaties between the nations and the United States.⁷ The Curtis Act of June 28, 1898 (30 Stat. 495, 512), made definite reference to this intended change, and four of the five allotment agreements recognized the imminence of the change by providing that the tribal government should not continue in existence longer than March 4, 1906.⁸ Although most of these agreements were later supplemented, all of the initial agreements, with the exception of the Creek agreement, had been approved and ratified prior to March 3, 1901. The one with the Creeks was approved by Congress on March 1 of that year, but it was not ratified by the tribe until March 25.

The first paragraph of section 3 of the act of March 3, 1901, was concerned with certain rights-of-way over Indian lands, including "any lands held by an Indian tribe or nation in the Indian Territory." The second paragraph contained no language which showed an intention to exclude the Indian Territory or even lands of the

⁷ See, for example, treaties between the Cherokees and the United States, May 6, 1828 (7 Stat. 311), and December 29, 1835 (7 Stat. 478, 481).

⁸ Section 63, original Cherokee agreement (32 Stat. 716, 725); Choctaw and Chickasaw agreement (30 Stat. 495, 512); section 46, Creek agreement (31 Stat. 861, 872). For similar provision as to Seminole nation see act of March 3, 1903 (32 Stat. 982, 1008).

Five Civilized Tribes from the scope of the eminent domain provision. It is to be noted that while the 1901 act allows the condemnation only of allotted lands, the special statutes dealing with the Indian Territory authorize condemnation of tribal lands as well. In view of the circumstances at the time the act was passed and in view of the broad language of the 1901 provision and the specific mention of Indian Territory in the first paragraph of the section in which it is found, we are led to the conclusion that the provision was meant to apply to allotted lands in the Indian Territory whenever a Territory or State had been formed. It was not until November 16, 1907, that the State of Oklahoma was finally admitted into the Union, but upon that date the authority conferred in the act of March 3, 1901, became available for the condemnation of Indian allotments in Oklahoma, in so far as such proceedings were not authorized by the 1898, 1902, or 1906 acts.

After Oklahoma had been admitted to statehood, the next pertinent act was passed on May 27, 1908 (35 Stat. 312), and was titled "An Act for the removal of restrictions upon part of the lands of allottees of the Five Civilized Tribes, and for other purposes." Section 1 restated and partially revised the restrictions on alienation and, in the last sentence of the section, provided:

* * * No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands, and for such purposes sections thirteen to twenty-three inclusive, of an act entitled "An Act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

In an opinion approved on October 31, 1917 (D-40462), the then Solicitor of the Department held that the 1908 act repealed the second paragraph of section 3, act of March 3, 1901, so far as it formerly had applied to Five Civilized Tribes lands. The opinion stated, in part:

The act of March 3, 1901 (31 Stat. 1084), in brief, authorizes condemnation of lands allotted to Indians for public purposes. This act is general in its operation. Congress, however, has legislated specifically as to the homestead tracts allotted to Creek Indians, especially as to full-blood Indians. The act of May 27, 1908, *supra*, prohibits the alienation or any incumbrance upon such homestead prior to April 26, 1931, except when the restrictions are removed for the sale and disposal of the proceeds for the benefit of the Indian. Congress then qualified the effect of the restriction of alienation so as not to "prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands", etc. The act of May 27, 1908, prohibits the alienation of the homestead of a full-blood minor Creek Indian and permits

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the exercise of the right of eminent domain solely for "rights of way for public purposes." The term "rights of way" can not be construed to include land desired for school purposes. * * *

* * * The general provisions of the act of March 3, 1901 (31 Stat. 1058), having been superseded by the specific provisions relating to the Creek restricted lands, it accordingly follows that there is no right of eminent domain under the existing law for the purpose of securing a school site upon the homestead of Annie Scott.

In another portion of the opinion it was necessary to discuss the same statutes and their application to Cherokee lands. The conclusion was that "under the views above expressed in the case of Annie Scott there is no right of eminent domain for school purposes."

The 1917 opinion appears to hold that the imposition of restrictions by section 1 of the act of 1908 repeals by implication the previously granted authority to condemn Five Civilized Tribes allotted lands and that the statement to the effect that the restrictions are not to be construed as preventing the condemnation of "rights of way for public purposes" was an affirmative grant of new authority for condemnation. The opinion further holds that the proposed use for a school site was not a "right of way" and so did not come within the authority for condemnation granted in the 1908 act. I do not agree with these conclusions, and believe the effect of the 1908 act must be reconsidered.

It is a familiar rule that repeals by implication are not favored, and that such a repeal will exist only where there is a positive repugnancy between the provisions of the new law and those of the old.⁹ It is also elementary that one statute is not repugnant to another unless they relate to the same subject. There must be a conflict between different acts on the same specific subject.¹⁰ The act of 1901 authorizes the condemnation of allotted lands for any public purpose under the laws of the State in the same manner as lands owned in fee simple by white citizens can be condemned. The authority so conferred was of necessity continuing in nature and the plain intent of Congress was that it should be available notwithstanding restrictions against alienation then or thereafter in force. Section 1 of the act of 1908 dealt with a totally different subject. That section reimposed, supplemented and extended the restrictions against alienation of lands allotted to Indians of the Five Civilized Tribes. The oft-reiterated and well-recognized reason for the imposition of such restrictions is the protection of the Indian from his own ignorance and inexperience in business dealings and from the greed and fraud

⁹ *United States v. Borden Co.*, 308 U. S. 188, 60 Sup. Ct. 182 (1939).

¹⁰ See Lewis' *Sutherland Statutory Construction*, vol. 1, sec. 247, pp. 468-9.

of other individuals. *Sunderland v. United States*, 266 U. S. 226, 234 (1924). It is true that the grant of the right of eminent domain is usually to be construed strictly against the grantee. But, on the other hand, the courts have long recognized the desirability of avoiding questions as to the conflict of sovereignty except when such questions are inescapable, and the courts have always tried to determine and follow the intention of the legislative body. The enumeration in the act of 1908 of the types of alienation which are forbidden¹¹ indicates that the Congressional prohibition did not repeal the statutory provisions which allowed the lands to be taken for a public purpose. That the lands cannot be taken from the Indians for the benefit of some private interest is in no way inconsistent with the right of a public instrumentality to proceed under statutory authority to take the lands for a valid public purpose. The procedure for such a taking is so well established that the possibility of fraud is reduced to a minimum. The right of the United States to participate in such a proceeding is an added guarantee against miscarriage of justice in the judicial action.

It is my conclusion that the eminent domain authority in the act of March 3, 1901, was not impliedly repealed by the provisions regarding restrictions against alienation in section 1 of the act of 1908.

This conclusion is strengthened rather than weakened by the clause in section 1 which preserves the right of eminent domain for "rights of way for public purposes." The very language shows that the purpose served by the statement was one of clarification rather than of authorization. When it is remembered that no right to condemn restricted Indian lands could exist unless Congress had so provided, the language of the statute to the effect that "No restriction of alienation shall be construed to prevent * * * eminent domain" shows that some authority to condemn existed and was recognized by the legislators; otherwise there would have been no right of condemnation to be prevented.

The use of the words "rights of way" raises the question as to whether those words imply a limitation on the broad rights of eminent domain. One of the rules of statutory construction is, of course, that the express mention of one person, thing, or consequence is tantamount to an express exclusion of all others. But the rule is applicable in determining the Congressional intent only if the term "rights of

¹¹ Section 5 of the act of 1908 provides: "That any attempted alienation or incumbrance by deed, mortgage, contract to sell, power of attorney, or other instrument or method of incumbering real estate, made before or after the approval of this Act, which affects the title of the land allotted to allottees of the Five Civilized Tribes prior to removal of restrictions therefrom, and also any lease of such restricted land made in violation of law before or after the approval of this Act shall be absolutely null and void."

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way" as used has a limited meaning. The definition of the words, however, has not been so fixed by usage as to be free of all ambiguity. Congress itself has used the words in legislating to mean a limitation upon the interest in the land which can be taken—for example, a limited fee or mere easement rather than a fee simple; and at another time to mean a limitation upon the use for which the land can be taken—for example, in section 23 of the act of February 28, 1902 (32 Stat. 43), the right was granted "to take and condemn lands for rights of way, depot grounds, terminals, and other railway purposes." Another possibility is that Congress may have intended the words to mean in general any taking by eminent domain and without limitation as to the nature of the public use or the interest in the land. The legislative history should indicate the Congressional intent.

The part of section 1 which deals with eminent domain was not contained in the original bill (H. R. 15641, 60th Cong., 1st sess.) either as introduced or as it first passed the House of Representatives. Nor was the matter of eminent domain discussed in the report of the committee (H. Rept. 1454) or in the debate on the floor of the House (Cong. Rec., 60th Cong., 1st sess., pp. 5425-27, 6189-90). The Senate Committee on Indian Affairs in its report (S. Rept. 575) recommended the following amendment be added to section 1 of the bill:

No restriction of alienation shall be construed to prevent the exercise of the right of eminent domain in condemning rights of way for public purposes over allotted lands.

The conferees for the House secured the addition of a further amendment:

and for such purposes sections thirteen to twenty-three, inclusive, of an act entitled "An Act to grant the right of way through Oklahoma Territory and the Indian Territory to the Enid and Anadarko Railway Company, and for other purposes," approved February twenty-eighth, nineteen hundred and two (Thirty-second Statutes at Large, page forty-three), are hereby continued in force in the State of Oklahoma.

The statement submitted by the House conferees to supplement the conference report explained the amendment thus:

Amendment No. 8 provides that no restrictions on alienation shall prevent the exercise of the right of eminent domain, and in conference a provision was agreed to making it certain that the provision of the railroad right-of-way act should not be repealed by this provision. [Cong. Rec., *supra*, p. 6781.]

In the discussion which preceded the adoption of the conference report by the House, Representative Sherman, Chairman of the House Committee on Indian Affairs and one of the conferees, said:

Another provision makes it clear that these restrictions do not prevent the exercise of the use of the right of eminent domain. [Cong. Rec., *supra*, p. 6782.]

The reports and the debates indicate that Congress intended to do no more than preserve existent authority to condemn. It is my conclusion that Congress intended to continue in force all eminent domain provisions in effect when the statute was passed on May 27, 1908. The Solicitor's opinion of October 31, 1917, is not in accord with the conclusions which have been reached in the present opinion, but although the 1917 ruling has been in force for over 20 years, it has not given rise during that period to any administrative practice which causes us to hesitate in overruling it. The denial of the right to condemn under the 1901 act may have caused some inconveniences to would-be condemnors, but the denial of a right to take land could not have clouded any title or fostered any vested interest which will be affected. In so far as the 1917 opinion is contrary to the conclusions stated in this opinion, it is hereby overruled.

The last portion of the eminent domain provision in the 1908 act presents one additional question not considered in the opinion of 1917. The words "and for such purposes sections thirteen to twenty-three, inclusive, of an act * * * approved February twenty-eighth, nineteen hundred and two * * * are hereby continued in force in the State of Oklahoma" may mean that the procedure set forth in those sections shall apply either to all condemnation proceedings or only to those involving railroads. The words "and for such purposes" are not free from doubt as to the meaning which they convey and we are justified in resorting to the legislative history to determine the correct interpretation. The words of reference to the 1902 act were added in conference at the request of the House conferees, and one of the conferees explained to the House that this addition made certain that the provisions of the railroad right-of-way act were not repealed. This explanation gives the words a "saving" function and nothing more. Prior to the admission of Oklahoma into statehood, sections 15 and 17 had served to provide the procedure for the taking of Indian land in Indian Territory by light or power companies under the act of April 26, 1906, but section 25 of that act also provided that the laws of Oklahoma were to govern after the admission of the State. The act of March 3, 1901, also implies that State laws are to govern. Sections 13 to 23, inclusive, of the 1902 act are not generally applicable to the needs of parties other than railroads. In the light of these circumstances it is my conclusion that while the condemnation of Indian lands by railroads is to be in accordance with the provisions of the 1902 act,

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that act does not control condemnation proceedings authorized for other than railroad purposes.

2. *The Court having jurisdiction to hear and determine proceedings in condemnation.* Some question has been raised as to whether condemnation actions should be brought in the State or Federal courts. The Supreme Court, in the case of *Minnesota v. United States*, 305 U. S. 382, has ruled that when the United States is an indispensable party to a proceeding, that action must be brought in the Federal courts unless Congress has otherwise provided. The Court further ruled that the State court was without jurisdiction over such proceedings. As the action in that case was brought to condemn Indian land under the act of March 3, 1901, *supra*, it follows that proceedings under that act to condemn Five Tribes lands must be brought in the Federal courts.

The procedure which is set forth in the act of February 28, 1902, includes in section 23 a provision that "all judicial proceedings herein authorized, may be commenced and prosecuted in the courts of said Oklahoma Territory which may now or hereafter exercise jurisdiction within said reservations or allotted lands." Section 15 of that act provides for consideration in the condemnation proceedings by "the United States court, or other court of competent jurisdiction." The act of April 26, 1906, incorporates section 15 of the 1902 act by reference. These various statutes, however, dealt with the taking of not only the lands of the Indians but also those of any other persons, corporation or municipality within the Indian Territory. With regard to the latter group, it is evident that a State court would have jurisdiction, but in a proceeding against restricted Indian lands the United States is an indispensable party and, as such, can be sued only in the Federal court. This conclusion is substantiated by the provision of the Oklahoma enabling act of June 16, 1906, which provided in section 16 that all causes pending in the courts of the Oklahoma Territory and the Indian Territory "in which the United States may be a party * * * shall be transferred to the proper United States circuit or district court for final disposition."

3. *Rights-of-way for public highways.* Section 4 of the act of March 3, 1901, *supra*, provides:

That the Secretary of the Interior is hereby authorized to grant permission, upon compliance with such requirements as he may deem necessary, to the proper State or local authorities for the opening and establishment of public highways, in accordance with the laws of the State or Territory in which the lands are situated, through any Indian reservation or through any lands which have been allotted in severalty to any individual Indians under any laws or

treaties but which have not been conveyed to the allottees with full power of alienation.

I have already ruled that section 3 of the act of 1901 relating to condemnation is applicable to lands of the Indians of the Five Civilized Tribes. The reasoning upon which that ruling is based compels the conclusion that section 4 above of the same act is likewise applicable to these lands.

Provisions for section line highways of limited width were included in the Creek and Cherokee agreements¹² and in section 24 of the act of April 26, 1906 (34 Stat. 137). But these were special provisions to meet temporary needs. The Creek and Cherokee agreements required that damages for the opening and establishment of public highways be paid from tribal funds during the existence of the tribal governments then scheduled to expire in 1906. The act of 1906 likewise required that damages be paid from tribal funds but as that act continued the tribal governments in force until otherwise provided by law, the determination of the damages and the payment thereof from tribal funds was limited to the period "prior to the inauguration of a State government." Legislation of this nature plainly is of the temporary type hereinbefore referred to as not intended to survive statehood. As laws "locally inapplicable," they were not continued in force by the enabling act and could not have been intended to displace other and more comprehensive statutory provisions such as contained in the act of 1901. Even though the act of 1901 could not, in the absence of a territorial or State government, become immediately available, this difficulty was completely removed by the formation of the State of Oklahoma. Indeed, as a law of the United States not then locally inapplicable, the act of 1901 was required to be given the same force and effect in Oklahoma as elsewhere by section 21 of the enabling act of June 16, 1906, *supra*.

4. *Secretarial grants of rights-of-way for telephone, telegraph and power transmission lines.* The first paragraph of section 3 of the act of March 3, 1901, *supra*, authorizes the Secretary of the Interior to grant a right-of-way in the nature of an easement for general telephone and telegraph business—

through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian Service, or through any lands which have been allotted in severalty to any

¹² Section 10, supplemental Creek agreement (32 Stat. 500) ; section 37, Cherokee allotment agreement (32 Stat. 716).

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individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation.

It follows from what has already been said that this provision of law is applicable to lands of the Five Civilized Tribes.

The act of February 15, 1901 (31 Stat. 790), authorizes the Secretary of the Interior to grant rights-of-way for telephone, telegraph and transmission lines and for sundry other purposes through reservations of the United States including Indian reservations, upon the condition, among others, that no such grant shall be made without the approval of the chief officer of the department having supervision over the reservation affected. With variations not here material, the act of March 4, 1911 (36 Stat. 1253), confers a like authority upon heads of departments with respect to telephone, telegraph and transmission lines. As to telephone and telegraph lines, these acts are broader in scope than the first paragraph of section 3 of the act of 1901 in that they authorize a grant of a right-of-way for a private telephone or telegraph line in addition to rights-of-way for lines used for general public service.

Whether or not the acts of February 15, 1901, and March 4, 1911, are applicable to lands of the Five Civilized Tribes depends upon whether such lands prior and subsequent to allotments in severalty may properly be classified as Indian reservations. I find little difficulty in holding that prior to allotment the lands belonging to the Five Civilized Tribes were legally constituted Indian reservations. Under certain early treaties, a comprehensive discussion of which is found in the *Handbook of Federal Indian Law* (ch. 3, sec. 4, subdivision E), specific and well-defined tracts of land were set apart as permanent homes for each of the nations comprising the Five Civilized Tribes. In *Minnesota v. Hitchcock*, 185 U. S. 373, 390, lands set aside for an Indian tribe with much less formality than this were declared to be an Indian reservation. See also *Spalding v. Chandler*, 160 U. S. 394. It is true that the lands were conveyed in fee to the nations by patents issued by the United States, but this did not terminate the guardianship relation existing between the Indians and the United States and they continued to be subject to the legislation of Congress enacted in the exercise of the Government's guardianship over the nations and their affairs. In this and in other respects the lands stood in exactly the same category as the lands of other legally constituted Indian reservations.

The administrative interpretation over a long period of years has been that the word "reservation" as used in the various right-of-way

statutes included lands allotted to individual Indians.¹³ However, on March 27, 1942, the Circuit Court of Appeals for the Tenth Circuit in *United States v. Oklahoma Gas & Electric Co.*, 127 F. (2d) 349, held the acts of February 15, 1901, and March 4, 1911, to be without application to an Indian allotment for the reason that the allotment was no longer a part of the reservation. Since a petition for certiorari has been filed by the United States and is now pending before the United States Supreme Court, the question of the applicability of these acts to allotted lands of the Five Civilized Tribes can only be answered conditionally. If certiorari be denied or the Supreme Court on review affirms the decisions of the Tenth Circuit Court of Appeals, the acts cannot be held to be applicable. If, on the other hand, the Supreme Court reverses the Circuit Court of Appeals and sustains the departmental interpretation of the acts, then it must be held that they apply to allotted lands of the Five Civilized Tribes.*

5. *Laws governing rights-of-way over and condemnation of lands acquired for Indian tribes in Oklahoma under the Oklahoma Indian Welfare Act.* By section 1 of the Oklahoma Indian Welfare Act¹⁴ the Secretary of the Interior is authorized to acquire lands for Indian tribes in Oklahoma and take title to such lands in the name of the United States in trust for the tribes. The authority extends to lands located within as well as without Indian reservations. The lands so acquired for an Indian tribe become in effect Indian reservation lands and as such are subject, in my opinion, to the provisions of the act of March 3, 1901, and the acts of February 15, 1901, and March 4, 1911.

This conclusion is in accord with the interpretation placed by this office on the word "reservation" as used in a right-of-way statute differing in no material respects from the statutes here involved. In a memorandum dated July 1, 1938, from the Acting Solicitor to the Assistant Secretary consideration was given to the question of whether lands purchased for Indian school purposes constituted a reservation within the meaning of an act of Congress authorizing the granting of irrigation ditch rights-of-way across reservations of the United States. Disagreeing with a proposed interpretation of the word "reservation," the Acting Solicitor said:

A. construction of the word "reservation" in this statute to refer only to reservations created out of the public domain and to exclude reservations where the land has been acquired by purchase, donation or otherwise unduly

¹³ *Fresno Water-Right Canal*, 35 L. D. 550, 551 (1907); Instructions—Applications for Power Permits within Indian Reservations, 42 L. D. 419, 420 (1913); *West Okanogan Valley Irrigation District*, 45 L. D. 563, 565, 567 (1916).

* Decided February 15, 1943, 318 U. S. 206. [Editor.]

¹⁴ Act of June 26, 1936 (49 Stat. 1967, 25 U. S. C. sec. 501).

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restricts the application of the act of Congress by departmental interpretation. No previous formal decision of this Department nor any court opinion has been found which interprets the term "reservation" in right of way statutes in the manner proposed. On the contrary in the *Icele Canal Company* case, 44 L. D. 511, at 512, it is reported that a reservation purchased by, and trust patented to, the Indians was held by the Department to be within the term "public lands and reservations of the United States" in the highway right of way statutes. The courts have generally given the term "reservation" a broad meaning to include any lands set apart by the Government for any purpose. (See *United States v. Portneuf-Marsh Valley Irrigation Co.*, 213 Fed. 601, at 603.) In this connection it is relevant to refer to the case of *United States v. McGowan* decided in the Supreme Court on January 3, 1938 (302 U. S. 535, 82 Sup. Ct. 305). That opinion overruled the holding of the lower Federal courts that the Reno Indian Colony was not Indian country nor an Indian reservation since it was purchased by the Government for the Indians from private owners and not set apart out of the public domain. The court repeated the definition of the term "Indian reservation" as including any area validly set apart for the use of the Indians under the superintendence of the Government and found that the lands purchased for Indian use had been "validly set apart for the use of the Indians."

In view of the fact that there are many instances in which lands are set apart for Indian purposes where the lands were acquired by purchase by the Indians or by the Government, this Department should not without strong reason restrict the application of the term "reservation" to exclude such lands with the result that these areas are not covered by the right of way statutes. * * *

The reasoning of the Acting Solicitor applies with even greater force to lands purchased and held in trust by the United States for an Indian tribe under the Oklahoma Indian Welfare Act. The absence of any declaration in the act that lands so acquired shall constitute an Indian reservation is unimportant. No such formal declaration is essential to the creation of an Indian reservation. It is enough that from what has been done there results a certain defined tract appropriated to Indian occupation and use. *Minnesota v. Hitchcock, supra.*

Summary of Conclusions. The conclusions to be drawn from the foregoing discussion are:

1. That authorization by Congress is a prerequisite to the valid condemnation of Indian lands restricted against alienation.

2. That the United States is an indispensable party to condemnation proceedings against the restricted lands of Indians of the Five Civilized Tribes.

3. That if Congress has authorized the condemnation of Indian lands it has also consented to suits against the United States in such cases subject to any condition which Congress sees fit to impose.

4. That the consent of the Secretary of the Interior is not essential to the maintenance of condemnation proceedings against lands of

Indians of the Five Civilized Tribes under the act of March 3, 1901 (31 Stat. 1084).

5. That section 11 of the Curtis Act of June 28, 1898 (30 Stat. 495), the act of February 28, 1902 (32 Stat. 43), and section 25 of the act of April 26, 1906 (34 Stat. 137), relating to the condemnation of lands of Indians of the Five Civilized Tribes constitute permanent legislation continued in force after the admission of Oklahoma into the Union by the Oklahoma enabling act of June 16, 1906 (34 Stat. 267), if not by the terms of the acts themselves.

6. That the act of March 3, 1901 (31 Stat. 1084), upon the admission of Oklahoma into the Union on November 16, 1907, became available as authority for the condemnation of lands allotted to Indians of the Five Civilized Tribes except in so far as authority to condemn allotted lands had been furnished by the acts of June 28, 1898 (30 Stat. 495), February 28, 1902 (32 Stat. 43), and April 26, 1906 (34 Stat. 137).

7. That the imposition of restrictions upon allotted lands of Indians of the Five Civilized Tribes by the act of May 27, 1908 (35 Stat. 312), did not repeal the authority for condemning such lands granted by the earlier acts.

8. That the provisions regarding eminent domain in the act of May 27, 1908, *supra*, did not limit the eminent domain authority previously granted.

9. That in the absence of Congressional direction to the contrary, the Federal and not the State courts have jurisdiction over proceedings in condemnation of restricted Indian lands.

10. That upon the admission of Oklahoma into the Union, the provisions of the act of March 3, 1901 (31 Stat. 1084), became available as authority for grants by the Secretary of the Interior of rights-of-way for public highways and for general telephone and telegraph business over lands of Indians of the Five Civilized Tribes.

11. That the provisions for section line highways contained in section 10 of the supplemental Creek agreement (32 Stat. 500), in section 37 of the Cherokee agreement (32 Stat. 716), and in section 24 of the act of April 26, 1906 (34 Stat. 137), were of temporary duration and not intended to survive the admission of Oklahoma into the Union.

12. That the lands of the Five Civilized Tribes prior to allotment constitute Indian reservations and as such are subject to the acts of February 15, 1901 (31 Stat. 790), and March 4, 1911 (36 Stat. 1253), authorizing the Secretary of the Interior to grant rights-of-way for telephone, telegraph and transmission lines, etc.

13. That the applicability of the acts of February 15, 1901, and March 4, 1911, *supra*, to lands allotted to Indians of the Five Civil-

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ized Tribes will be determined by the final decision in *United States v. Oklahoma Gas & Electric Company*, decided by the Tenth Circuit Court of Appeals on March 23, 1942, 127 F. (2d) 349, and now pending before the United States Supreme Court on petition of the United States for certiorari.*

14. That lands acquired for Indian tribes under authority of section 1 of the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967), became in effect Indian reservations and as such subject to the provisions of the acts of March 3, 1901, February 15, 1901, and March 4, 1911, *supra*.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

USE OF ALLOTTED INDIAN LANDS

Opinion, August 24, 1942

POWER OF SECRETARY—USE OF INDIAN ALLOTTED LANDS—LAND-USE CLASSIFICATION.

The Secretary is authorized to make a land-use classification of allotted lands, this being an administrative measure incidental to the carrying out of various statutory authorities.

The Secretary is authorized to exercise all powers vested in him by statute with respect to leases, development loans, timber sales, and other land management activities, in such a way as to accomplish conservation objectives.

Statutes describing the jurisdiction of the Indian Office and of the Department of the Interior with respect to Indian affairs are not to be construed as grants of new substantive powers.

Section 6 of the act of June 18, 1934, is not a grant of new powers to the Secretary but is a direction to the Secretary to exercise, in the interest of conservation, powers theretofore vested in him.

Allotted Indian lands are not "lands owned or controlled by the United States or any of its agencies" within the meaning of the Soil Conservation and Domestic Allotment Act of April 27, 1935.

COHEN, *Acting Solicitor*:

My opinion has been requested on the following questions:

1. Does the Secretary of the Interior have authority to classify allotted lands as agricultural, grazing, and forest lands regardless of whether the Indians have accepted the Indian Reorganization Act?

* Decided February 15, 1943, 318 U. S. 206. [Editor.]

2. If the Secretary of the Interior has authority to classify the allotted lands, does he also have authority to require the allottees to use their allotted lands in accordance with his classification and in accordance with the rules and regulations approved by him for the conservation of the soil and other natural resources?

The background against which these questions should be considered is thus set forth by the Commissioner of Indian Affairs:

In the Dakotas, Montana, and other states in the Northern Great Plains region, there are extensive areas of grazing lands which are marginal or sub-marginal for agricultural purposes. During periods when the precipitation is above the average there is usually a demand for leases on Indian grazing lands to be used for the growing of wheat and other small grains. This demand usually comes from non-Indians who live on or in the vicinity of Indian reservations. There are also a number of Indian allottees who insist on breaking out the native sod and using the lands for agricultural purposes if it appears the precipitation will permit. As a result much of the lands which are sub-marginal for agricultural purposes are abandoned during dry cycles and are subject in many instances to severe soil erosion. It usually requires a decade or more for the native grasses to re-establish themselves on these plowed areas.

The use of allotted lands which are leased to Indians or non-Indians can be controlled through proper stipulations in the lease contracts. If grazing lands should not be plowed, leasing such land for agricultural purposes can be disapproved. There is some question, however, as to whether the Secretary of the Interior has authority to prevent an Indian allottee from using lands which are chiefly valuable for the production of native grasses for agricultural purposes or from using this grazing and agricultural land in a manner which will deplete the fertility of the soil through erosion or other causes.

Question 1

The classification of allotted lands is an administrative measure which, although not expressly authorized by statute, is lawful and proper if it is a measure incidental to the carrying out of some statutory duty or authority vested in the Secretary of the Interior.¹ There are in fact a number of statutory duties and authorities vested in the Secretary of the Interior in the exercise of which the classification of allotted lands would be useful. Among these are the supervisory powers of the Secretary of the Interior with respect to: (a) the leasing of allotted lands;² (b) the sale of timber therefrom;³ (c) the

¹ Act of July 9, 1832, sec. 1 (4 Stat. 564), as amended (25 U. S. C. 2); act of June 30, 1834, sec. 17 (4 Stat. 735, 738, 25 U. S. C. 9); act of February 14, 1903 (32 Stat. 825, 830, 5 U. S. C. 485).

² Act of June 25, 1910, sec. 4 (36 Stat. 855, 856, 25 U. S. C. 403); act of March 3, 1921, sec. 1 (41 Stat. 1225, 1232, 25 U. S. C. 393); act of May 18, 1916, sec. 1 (39 Stat. 123, 128, 25 U. S. C. 394); act of May 31, 1900, sec. 1 (31 Stat. 221, 229, 25 U. S. C. 395); act of March 3, 1909 (35 Stat. 781, 783, 25 U. S. C. 396), amended by act of May 11, 1938 (52 Stat. 347, 25 U. S. C. 396a-396f); act of July 8, 1940 (54 Stat. 745); act of September 21, 1922, sec. 6 (42 Stat. 994, 995, 25 U. S. C. 392); see Cohen, *Handbook of Federal Indian Law* (1942), 227-228.

³ Act of June 25, 1910, sec. 8 (36 Stat. 855, 857, 25 U. S. C. 406).

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making of individual Indian loans for the purpose of land development and improvement;⁴ and (d) the responsibility for advising Indian land owners concerning the best use of their lands.⁵ In the discharge of these functions, as well as in the discharge of many other responsibilities fixed by statute or treaty, the classification of Indian lands according to optimum use would constitute an appropriate means to the achievement of purposes approved by Congress. I am of the opinion, therefore, that the Secretary of the Interior is authorized to effect such a classification of Indian lands.

Question 2

Upon the classification of Indian lands, it becomes pertinent to ask whether, and to what extent, the Secretary of the Interior may require the landowner to use such lands for the purposes to which a classification shows them to be best adapted. The answer to this question is in part determined by the considerations advanced with respect to the preceding question. The Secretary of the Interior has, by statute, a broad discretionary power to approve or to disapprove leases of allotted lands. It would, in my opinion, be within his power to modify existing regulations on Indian leasing so as to require the disapproval of all leases not made for the purposes to which a land-use classification shall have shown the land in question to be best fitted. Similarly, with respect to the Secretary's statutory control over loans to Indians for land use and land improvement, it would be, in my opinion, lawful and proper for the Secretary of the Interior to issue a regulation forbidding all loans which would finance any development or improvement inconsistent with the proper use of the land as shown by a land-classification schedule. Similar requirements might be included in existing departmental regulations dealing with the sale of timber, the issuance of grazing permits, commercial permits, and rights-of-way, the maintenance of irrigation services and the collection of irrigation charges, and numerous other activities in which the Department exercises a supervisory control over Indian land use. Broad as is the field covered by these various statutory controls, the abstract question remains whether, apart from its various statutory veto powers over improper land use, there is a general power in the Department of the Interior to regulate the use of Indian allotments by the Indians themselves and, perhaps,

⁴ Act of June 18, 1934, sec. 10 (48 Stat. 984, 986, 25 U. S. C. 470); act of June 26, 1936, sec. 6 (49 Stat. 1967, 1968, 25 U. S. C. 506); see annual appropriation acts. See *Handbook of Federal Indian Law*, 245-248.

⁵ Act of November 2, 1921 (42 Stat. 208, 25 U. S. C. 13). Many treaties promise agricultural instruction. See *Handbook of Federal Indian Law*, 238-240, 44-45.

to require affirmative action by an Indian allottee in the interests of conservation. Specifically, for example, it may be asked whether an Indian allottee may be ordered to plant alfalfa instead of corn if such action is necessary to prevent erosion.

It has been suggested that such a power is established by section 1 of the act of July 9, 1832, as amended,⁶ by section 17 of the act of June 30, 1834,⁷ by section 12 of the act of February 14, 1903,⁸ and by section 6 of the act of June 18, 1934.⁹

The first of these statutes, in its Code form, declares:

Duties of Commissioner. The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe, have the management of all Indian affairs and of all matters arising out of Indian relations.

This was the statute which established the office of the Commissioner of Indian Affairs. It was designed not to add to the business or the authority of the Federal Government in Indian matters, nor to diminish the scope of self-government then exercised by the Indian tribes and nations, but merely to locate a particular mass of Government business in a statutory office. The reference to "management of all Indian affairs" did not confer a power to manage the affairs of Indians or of Indian tribes or nations any more than a reference to "foreign affairs" in defining the duties of the State Department could be construed to confer upon that Department a power to manage the affairs of foreigners or of foreign nations. Just as our "foreign affairs" are affairs of our Government relating to foreign matters, so our "Indian affairs" are affairs of our Government relating to Indian matters. This is made clear in Chief Justice Marshall's disquisition upon the meaning of the phrase "management of Indian affairs" in the case of *Worcester v. Georgia*.¹⁰ If there were any doubt on the point, it would be resolved by the consideration that the 1832 statute provided specifically that the Commissioner was to act pursuant to regulations which the President might prescribe. The scope of the President's power is set forth in section 17 of the act of June 30, 1834, which, in its present Code form provides:

The President may prescribe such regulations as he may think fit for carrying into effect the various provisions of any act relating to Indian affairs, and for the settlement of the accounts of Indian affairs.

⁶ 4 Stat. 564, 25 U. S. C. sec. 2. The act of March 3, 1849 (9 Stat. 395), made the Commissioner of Indian Affairs responsible to the Secretary of the Interior instead of the Secretary of War.

⁷ 4 Stat. 735, 738, 25 U. S. C. sec. 9.

⁸ 32 Stat. 825, 830, 5 U. S. C. sec. 485.

⁹ 48 Stat. 984, 986, 25 U. S. C. sec. 466.

¹⁰ 6 Pet. 515, 553 (1832).

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It will be noted that the President's regulatory power is the power to prescribe rules and regulations appropriate for the carrying into effect of various statutes. It does not go beyond this, and the authority of the Commissioner of Indian Affairs, which is subordinate to that of the President, must likewise be deemed subject to the limitations which the statute imposes upon the President.

The third of the general statutes cited is section 12 of the act of February 14, 1903.¹¹ In its present Code form this statute declares:

The Secretary of the Interior is charged with the supervision of public business relating to the following subjects:

* * * * *

Second. The Indians.

By this statute Congress purported to describe the jurisdiction of the Department of the Interior as including public business relating to the Indians. This statute clearly did not subject Indians or Indian property to any new restraints, obligations or liabilities.

Analysis of the foregoing statutes leads to the conclusion that what is sometimes loosely spoken of as a "general supervisory power" derived from these statutes is, strictly speaking, simply a power to take administrative measures necessary for the execution of responsibilities and authorities otherwise more definitely fixed by statute or treaty. These general statutes cannot be relied upon as grants of new powers unrelated to the statutory responsibilities of the Department. Particularly is this true when the question is whether these general statutes authorize the Department to impose restraints upon the use of real property or to require affirmative actions or services from a property owner by reason of his property ownership.

This basic question was before the Supreme Court in *United States v. Paine Lumber Co.*, 206 U. S. 467 (1907). In that case the Supreme Court held that an allottee had the right to cut and sell timber on his allotment even though the Interior Department sought to prevent such cutting and sale. The Court in that case declared:

* * * it hardly needs to be said that the allotments were intended to be of some use and benefit to the Indians. And, it will be observed, that on that use there is no restraint whatever. A restraint, however, is deduced from the provision against alienation, the supervision to which, it is asserted, the Indians are subject and the character of their title. It is contended that the right of the Indians is that of occupation only, and that the measure of power over the timber on their allotments is expressed in *United States v. Cook*, 19 Wall. 592. We do not regard that case as controlling. The ultimate conclusion of the court was determined by the limited right which the Indians had in the lands from which the timber there in controversy was cut.

¹¹ 32 Stat. 825, 830, 5 U. S. C. sec. 485.

* * * If such were the title in the case at bar, such would be the conclusions. But such is not the title. We need not, however, exactly define it. It is certainly more than a right of mere occupation. The restraint upon alienation must not be exaggerated. It does not of itself debase the right below a fee simple. *Libby v. Clark*, 118 U. S. 250. The title is held by the United States, it is true, but it is held "in trust for individuals and their heirs to whom the same were allotted." The considerations, therefore, which determined the decision in *United States v. Cook* do not exist. The land is not the land of the United States, and the timber when cut did not become the property of the United States. And we cannot extend the restraint upon the alienation of the land to a restraint upon the sale of the timber consistently with a proper and beneficial use of the land by the Indians, a use which can in no way affect any interest of the United States. It was recognized in *United States v. Cook* that "in theory, at least," that land might be "better and more valuable with the timber off than with it on." Indeed, it may be said that arable land is of no use until the timber is off, and it was of arable land that the treaty contemplated the allotments would be made. We encounter difficulties and baffling inquiries when we concede a cutting for clearing the land for cultivation, and deny it for other purpose. At what time shall we date the preparation for cultivation and make the right to sell the timber depend? Must the axe immediately precede the plow and do no more than keep out of its way? And if that close relation be not always maintained, may the purpose of an allottee be questioned and referred to some advantage other than the cultivation of the land, and his title or that of his vendee to the timber be denied? Nor does the argument which makes the occupation of the land a test of the title to the timber seem to us more adequate to justify the qualification of the Indians' rights.

It is based upon the necessity of superintending the weakness of the Indians and protecting them from imposition. The argument proves too much. If the provision against alienation of the land be extended to timber cut for purposes other than the cultivation of the land it would extend to timber cut for the purpose of cultivation. What is there in the latter purpose to protect from imposition that there is not in the other? Shall we say such evil was contemplated and considered as counterbalanced by benefit? And what was the benefit? The allotments, as we have said, were to be of arable lands useless, may be, certainly improved by being clear of their timber, and yet, it is insisted, that this improvement may not be made, though it have the additional inducement of providing means for the support of the Indians and their families. We are unable to assent to this view. [Pp. 472-474.]

While the decision of the Supreme Court in the *Paine Lumber Co.* case was limited by its subsequent holding in *Starr v. Campbell*,¹² where the Court held that a statutory restriction upon alienation extended to timber upon lands valuable only for lumbering, and although the sale of timber on Indian allotments was later, by express legislation, placed under the control of the Secretary of the Interior,¹³ the principles set forth by the Supreme Court in the *Paine Lumber Co.* case have never been overruled and remain valid.

¹² 208 U. S. 527 (1908).

¹³ Act of June 25, 1910, sec. 8 (36 Stat. 855, 857, 25 U. S. C. sec. 406).

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It is true that statements may be found in a number of court opinions which refer to general supervisory powers exercised by the Department of the Interior over Indian affairs; but it will be found that in each case where such language appears there is some specific statutory authorization for departmental action and the general statutes discussed above are invoked only for the purpose of filling in gaps of detail on which those statutes are silent.¹⁴ On the other hand, actions which this Department purported to justify on the basis of "general supervisory powers" have been repeatedly condemned by the Federal courts as unauthorized and unlawful. On this issue the Handbook of Federal Indian Law analyzes the cases as follows (pp. 102-103):

Whether the President, the Secretary of the Interior, or the Commissioner of Indian Affairs has "general supervisory authority" over Indians in the absence of specific legislation has been questioned in several cases.

In the case of *Francis v. Francis*¹⁶⁸ the President, pursuant to a treaty reserving land to individual Indians and their heirs, issued a patent conveying a title with restrictions upon conveyance. The Supreme Court held ineffectual the restrictive clause because the "President had no authority, in virtue of his office, to impose any such restriction; certainly not, without the authority of an act of Congress, and no such act was ever passed." [P. 242.]

The question of whether internal affairs of Indian tribes, in the absence of statute, are to be regulated by the tribe itself or by the Interior Department was squarely before the Supreme Court in the case of *Jones v. Meehan*.¹⁶⁹ One of the questions presented by that case was whether inheritance of Indian land, in the absence of statute, was governed "by the laws, usages, and customs of the Chippewa Indians" or by the rules and regulations of the Secretary of the Interior.¹⁷⁰ In line with numerous decisions of lower courts, the Supreme Court held that the Secretary of the Interior did not have the power claimed, and that in the absence of statute such power rested with the tribe and not with the Interior Department.

¹⁶⁸ 203 U. S. 233 (1906).

¹⁶⁹ 175 U. S. 1 (1899). Similarly in other fields: The case of *United States v. George*, 228 U. S. 14 (1913) holds that a regulation of the Interior Department relating to public lands is invalid where not authorized by any act of Congress. The argument that general power to prescribe reasonable regulations governing public lands is conferred by Revised Statutes, section 441, and by other similar statutes, was rejected by the Supreme Court in this case with the following comment:

"It will be seen that they confer administrative power only. This is undubitably so as to sections 161, 441, 453, and 2478; and certainly under the guise of regulation legislation cannot be exercised. *United States v. United Verde Copper Co.*, 196 U. S. 207. (P. 20.)" Also see *Morrill v. Jones*, 106 U. S. 466, 467 (1882).

Unless empowered by statute, the Secretary of the Interior is not authorized to issue regulations granting an extension of time for the payment of certain accrued water right charges, Op. Sol. I. D., M. 26034, July 3, 1930, nor to create a charge against the Indians on their lands, Op. Sol. I. D., M. 27512, February 20, 1935. Also see *Romero v. United States*, 24 C. Cls. 331 (1889); *Leecy v. United States*, 190 Fed. 289 (C. C. A. 8, 1911); app. dism. 232 U. S. 731 (1914); *Mason v. Sams*, 5 F. 2d, 255 (D. C. W. D. Wash. 1925), and *Hale v. Wilder*, 8 Kans. 545 (1871).

¹⁷⁰ 175 U. S. 1, 31.

¹⁴ See analysis of these cases in Cohen, *Handbook of Federal Indian Law*, 103.

In *Romero v. United States*,¹⁷¹ a regulation of the President regarding the salaries of Indian Service officials was held invalid despite the claim that this might be justified under Revised Statutes, section 465.¹⁷² The court declared that such regulations "must be in execution of, and supplementary to, but not in conflict with the statutes." The actual holding in this case may be explained on the theory that the regulation questioned conflicted with general provisions of law on tenure of office.

In the case of *Leecy v. United States*¹⁷³ the claim of the Department that Revised Statutes 441¹⁷⁴ and 463¹⁷⁵ were a grant of general regulatory powers was again rejected. In this case, as in the *Romero* case, it may be argued that the regulation in question was in derogation of the statutory rights of the Indians. A fair reading of the opinion, however, indicates that the supposed statutory rights invaded were so tenuous that every unauthorized regulation of the conduct of an Indian, or any other citizen, could similarly be regarded as a violation of statutory or constitutional rights. The real force of the decision is the holding that sections 441 and 463 of the Revised Statutes do not create independent powers.¹⁷⁶

The claim of administrative officers to plenary power to regulate Indian conduct has been rejected in every decided case where such power was not invoked simply to implement the administration of some more specific statutory or treaty provision. (*Handbook of Federal Indian Law*, pp. 102-103.)

¹⁷¹ 24 C. Cls. 331 (1889).

¹⁷² Act of June 30, 1834, sec. 17, 4 Stat. 735, 738, 25 U. S. C. 9.

¹⁷³ 190 Fed. 289 (C. C. A. 8, 1911), app. dism. *United States v. Leecy*, 232 U. S. 731 (1914).

¹⁷⁴ Derived from Act of March 3, 1849, 9 Stat. 395, 5 U. S. C. 485.

¹⁷⁵ Derived from Act of July 9, 1832, 4 Stat. 564, 25 U. S. C. 2.

¹⁷⁶ In *LaMotte v. United States*, 254 U. S. 570 (1921), mod'g and aff'g 256 Fed. 5 (C. C. A. 8, 1919), the Supreme Court upheld the validity of regulations covering the leasing of restricted lands which were subject to the approval of the Secretary of the Interior by the Act of June 28, 1906, sec. 7, 34 Stat. 539, on the ground that "The regulations appear to be consistent with the statute, appropriate to its execution, and in themselves reasonable."

In *United States v. Birdsall*, 233 U. S. 223 (1914), rev'g 206 Fed. 818 (D. C. N. D. Iowa 1913), the regulation challenged and upheld dealt with the conduct of departmental employees, and was authorized by Revised Statutes § 2058, 25 U. S. C. 31, derived from Act of June 30, 1834, sec. 7, 4 Stat. 736, Act of June 5, 1850, sec. 4, 9 Stat. 437, and Act of February 27, 1851, sec. 5, 9 Stat. 587.

I conclude, then, that the authority of the Department of the Interior with respect to the utilization of Indian allotments is a statutory authority, and that any exercise of that authority must be justified either by some statute directly conferring the power in question or by a showing that the exercise of such power is incidental and essential to the carrying out of a statutory mandate and therefore justified, under the general acts above reviewed, as a necessary administrative means to execution of such a mandate.

There remains the question whether section 6 of the act of June 18, 1934,¹⁵ confers upon the Secretary of the Interior a duty or power to control the use of Indian allotments in the interests of conservation. The language of the statute is:

¹⁵ 48 Stat. 984, 986, 25 U. S. C. sec. 466.

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The Secretary of the Interior is directed to make rules and regulations for the operation and management of Indian forestry units on the principle of sustained-yield management, to restrict the number of livestock grazed on Indian range units to the estimated carrying capacity of such ranges, and to promulgate such other rules and regulations as may be necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes.

This language may be construed as imposing an obligation upon the Secretary of the Interior, acting under various laws, above noted, controlling the use and disposition of Indian lands, to take such action as will best effectuate sustained-yield management of forests, the restriction of range livestock, and the other objectives set forth in the statute. On the other hand, this language may be construed as going beyond all existing law and conferring original authority upon the Secretary of the Interior to issue whatever rules and regulations may, in his opinion, be "necessary to protect the range from deterioration, to prevent soil erosion, to assure full utilization of the range, and like purposes." Under the latter interpretation, the statute might be construed to authorize the Secretary of the Interior not only to require that Indian allottees farm the land in a prescribed manner, or grow specified crops, for the purpose of preventing soil erosion, but even to require that an Indian unable to work his land should lend or lease it to another person able and willing to work the land, in order to assure its "full utilization."

This broad interpretation of section 6 would represent so large an infringement of what are ordinarily considered to be rights of land-owners that it would take a strong argument from the legislative history of the statute to establish the propriety of such an interpretation. The fact is, however, that the legislative history of the statute points entirely in the direction of a much more restricted interpretation. This section was explained and justified, on the floor of the House, by the sponsor of the act, who was also the Chairman of the Committee reporting it, as making mandatory the exercise of certain departmental functions which were then deemed to be optional. Congressman Howard declared, in explaining this section:

The bill seeks, through section 6, to assure a proper and permanent management of the Indian forest and grazing lands and makes such management mandatory on the Secretary of the Interior instead of optional, as at present. It seeks to prevent the destructive use of Indian forests and range lands. It directs the Secretary of the Interior to place the Indian forests, comprising some 8,000,000 acres of highly valuable and productive timberland, on a basis of permanent sustained yield management, which means that hereafter the annual cut of timber will be restricted to the annual growth capacity of the forest, with continuous reforestation as the cutting proceeds. This will assure that the Indian forests will be permanently productive and will yield continuous revenue to the tribes.

This same section assures the adoption of proper range management by requiring the Secretary to make the necessary rules and regulations to assure that end. Indian grazing lands constitute about five-sevenths of the whole Indian estate, and the purchase provisions of the bill, combined with the regulatory powers conveyed by section 6, will open the way for developing Indian livestock grazing in lieu of the leasing system, which has made of multitudes of Indians petty landed proprietors seeking to live on small rentals instead of by their own enterprise. [78 Cong. Rec. 11730.]

Far from indicating that section 6 was intended to diminish the managerial powers of Indian landowners and to increase the supervisory powers of the Interior Department, Congressman Howard explained that the general purpose of the legislation was to do precisely the opposite:

* * * The powers of this Bureau over the property, the persons, the daily lives and affairs of the Indians have in the past been almost unlimited. It has been an extraordinary example of political absolutism in the midst of a free democracy—absolutism built up on the most rigid bureaucratic lines, irresponsible to the Indians and to the public; shackled by obsolete laws; resistant to change, reform, or progress; which, over a century, has handled the Indians without understanding or sympathy, which has used methods of repression and suppression unparalleled in the modern world outside of Czarist Russia and the Belgian Congo.

* * * * *

In most of his actions the Indian must today take his orders from a Federal Bureau, and against these orders he has no legal appeal. He may petition, he may complain; but he has no legal defense against this bureaucratic power.

This thoroughly unnatural and unwholesome position of political and social inferiority is largely responsible for the endless conflicts between the Government and its Indian wards, for the petty factionalism and conflict among the Indians themselves, for the psychology of complaint and apathy which afflicts the Indians. Deprived of the natural outlet for human energy in creative work for himself and his race, the Indian has fallen back onto blind rage against the chains that bind him. [*id.* 11729.]

A similar interpretation is placed upon section 6 and upon the bill as a whole in the testimony of departmental representatives in hearings on the bill and in the reports of the committees thereon.¹⁶

It must be remembered that when we seek to determine "the intent of the legislature," in interpreting provisions of the act of June 18, 1934, we must look not only to the interpretation of the language of the act by Congress but also to the interpretation put upon the act by the Indians when, on various reservations, they voted pursuant to section 18 of this act to determine whether the act should or should not

¹⁶ See Hearings before Sen. Comm. on Ind. Aff., 73d Cong., 2d sess., on S. 2755 and S. 3645 (1934); Hearings before House Comm. on Ind. Aff., 73d Cong., 2d sess., on H. R. 7902 (1934); H. Rept. 1804, 73d Cong., 2d sess. (May 28, 1934); Sen. Rept. 1080, 73d Cong., 2d sess. (May 10, 1934); Conference Report, H. Rept. 2049, 73d Cong., 2d sess. (June 15, 1934).

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apply to them. In a very real sense the Indians were, in this respect, legislators. An analysis of the interpretations placed upon section 6 of this act when the Indians were called upon to vote on the application of the act to their respective reservations shows that this section was consistently interpreted by the Indian Office, by the Interior Department, and by the Indians as *limiting* rather than *expanding* the discretion theretofore vested in the Secretary of the Interior under prior legislation. Again and again, it was emphasized that this section made *mandatory* powers which had theretofore been *discretionary*, that it did not vest new powers in the Interior Department or impose, correlatively, new restraints upon the Indians, but simply sought to prevent future action by the Interior Department, which would serve to dissipate and destroy Indian natural resources,—as so much of the past action of the Interior Department was thought to have done. Thus, in a circular called "FACTS ABOUT THE NEW INDIAN REORGANIZATION ACT" signed by Commissioner Collier and issued a few days after the approval of the act, the effect of section 6 was thus summarized:

Common-sense management of Indian forests and grazing lands is made a legal obligation of the Secretary in Section 6. Through this section Congress orders the Secretary not to allow any clean cutting or devastating logging methods in Indian timber, but to regulate the extent and character of the logging in such a way that there will always be a good stand of merchantable timber left for the children and grandchildren of the present owners.

The Secretary is also directed to prevent overgrazing of Indian range units, and to that end to keep down the number of cattle and sheep that can be grazed on any unit to the carrying capacity of the land.

On the question of whether the Indians would be in the same position as white landowners with respect to compliance with Government agricultural policies, the Indians received this assurance in a circular entitled "Questions and Answers Concerning the Indian Reorganization (Modified Wheeler-Howard) Act," signed by the Commissioner of Indian Affairs:

The Federal Government controls agricultural production by contract with individuals. It would be up to the Indians to decide whether they would want to enter into such contracts. [P. 5.]

Repeated assurances were given to the Indians by representatives of this Department that in voting to accept the act of June 18, 1934, they would not be surrendering any rights or powers which they then possessed over their allotments. Under the circumstances, I believe that it would be a breach of faith to hold at this time that on those Indian reservations which are subject to the act of June 18, 1934, Indian allottees and Indian allotments are subject, under section 6 of

that act, to obligations, restraints, and liabilities not applicable to other reservations.

Finally, it must be recognized that the narrower construction of section 6 which was repeatedly advanced to the Indians, which imposes upon the Secretary of the Interior a duty to carry out conservation policies, in the exercise of all his statutory functions respecting Indian land, is given substantial content by a large number of specific statutes already noted. Certainly it cannot be said that this interpretation of section 6 makes the provision meaningless or ineffective.

A further question may be raised whether under the Soil Conservation and Domestic Allotment Act of April 27, 1935,¹⁷ it may be held that Indian allotments are "lands owned or controlled by the United States or any of its agencies," as to which Congress has conferred managerial powers in the interest of conservation upon appropriate administrative agencies of the Federal Government.

This question has heretofore received careful consideration from this Department and from the Department of Agriculture. On the one hand, it has been argued that the relation of guardianship in which this Department stands towards the Indians, under various acts of Congress, involves the subjection of allotted lands to Federal "control" within the meaning of the Soil Conservation and Domestic Allotment Act. On the other hand, it has been argued that control of an Indian allotment is vested by statute and by the terms of his patent in the allottee himself, and that the Department of the Interior or the Federal Government as a whole exercises jurisdiction over the land only in the sense that a State or municipal government may exercise jurisdiction over privately owned land.

The determination has been made by the Department of Agriculture¹⁸ and by this Department¹⁹ that Indian allotments are not lands "owned or controlled by the United States or any of its agencies," within the meaning of the Soil Conservation and Domestic Allotment Act, and that therefore appropriate conservation measures are to be effected through agreement and compensation rather than through unilateral commands.

In my opinion this decision is correct. Upon the basis of this decision considerable sums of money have been paid to Indian allottees pursuant to agreements which would be illegal if it should be held that the lands covered by these agreements were owned and controlled not by the allottees but by the Department of the Interior. I am accordingly of the opinion that neither section 6 of the act of

¹⁷ 49 Stat. 163, 16 U. S. C. sec. 590a, *et seq.*

¹⁸ See memorandum of Solicitor Mastin G. White, dated February 17, 1937.

¹⁹ See memorandum of Acting Solicitor Kirgis, dated July 15, 1937.

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June 18, 1934, nor the provisions of the Soil Conservation and Domestic Allotment Act of April 27, 1935, dealing with lands "owned or controlled by the United States or any of its agencies" can properly be construed as granting to the Secretary of the Interior new powers to manage Indian allotments without the consent of the allottee.

By way of summary, then, it may be said that on all reservations the Secretary of the Interior, with respect to all powers of control vested in him by specific statutes dealing with leases, permits, loans, and other aspects of the use and disposition of allotted lands, is authorized to exercise such powers in the interest of conservation. On those reservations which are subject to the act of June 18, 1934, the exercise of such powers is not only authorized but is directed by law. The promulgation of rules and regulations is justified to the extent that such rules and regulations are necessary or incidental in accomplishing the foregoing objectives.

All of the foregoing discussion relates, of course, to the problem of control over allotted lands, the only problem here presented. It should be noted that under statute and court decision a larger degree of administrative control is permissible with respect to the use of Indian tribal lands. On this question Solicitor Margold's memorandum for the Commissioner of Indian Affairs, dated November 11, 1935, makes the following points:

Cases upholding departmental authority to prevent waste of tribal lands turn on the proposition that the Indians have only a right of occupancy in tribal lands, with such rights in the land as are possessed by a tenant for life and subject to similar restraint against waste. (*United States v. Cook*, 19 Wall. 591; *Pine River Logging Co. v. United States*, 186 U. S. 279.)

The estate of an allottee, however, is a legal or equitable fee simple, and such an estate is not subject, by any principle of the common law, to the doctrine of waste. That a trust patent vests in the allottee "a complete equitable title" (*Woodward v. Graffenried*, 238 U. S. 284, 318) is well settled law.

"The purpose of the holding in trust by the United States is to prevent allottees from improvidently alienating or encumbering the land, not to cut down or postpone their rights in other respects." (*State of Oklahoma v. State of Texas*, 258 U. S. 574, 597).

It is equally well settled that a patent subject only to restrictions upon alienation vests in the allottee "full title", the United States retaining "no interest whatever". (*United States v. Auger*, 153 Fed. 671, 672, app. dis. 170 Fed. 1021; *Schrumpscher v. Stockton*, 183 U. S. 290, 299.) * * *

After quoting from and discussing the case of *United States v. Paine Lumber Co.*, *supra*, Solicitor Margold went on to say:

The view that the United States has no such interest in allotted lands as would support action against waste is also maintained in *Thayer v. United States*, 20 Ct. Cl. 137, in which the Court of Claims held that the issuance of

a patent (subject to restrictions upon alienation) related back to the time when the Indian allottee entered into possession and, therefore, estopped the Government "from setting up any title or claim for waste committed in the meantime" (i.e. after the grant of possession and prior to the final approval of the patent). Thus the doctrine that the estate of an allottee is a fee simple not subject to restraints against waste is here extended even to a case where the waste was really committed before the patent finally issued.

I conclude that there is no legal justification for the statement contained in the paragraph marked "Authorization" that "Similar authority exists with respect to allotted lands" and recommend that this sentence be deleted from the proposed regulations.

In view of the foregoing decisions, the first section of the proposed regulations manifestly exceeds the authority of the Commissioner. As it stands, it purports to authorize and direct the Commissioner to determine how many head of stock each Indian owner may keep upon his own allotment. On its face, this provision covers, in addition to tribal lands, individually owned trust patented lands, and even fee patented lands whether or not subject to restrictions upon alienation. I think it probable that an attempt to enforce such a provision according to its terms would lead inevitably to violence and would require the assistance of an army. Even if the legal power existed, it would be administratively impossible to regulate the private affairs of each Indian landowner in this way,—and it is significant to note that the Indian Service has never attempted any such supervision. Having reached the conclusion that legal authority for this provision does not in fact exist, I can only advert to the serious consequences that would ensue should some zealous employee of the Department, pursuant to the proposed regulations, enter upon an Indian's land to reduce his herds and be met with violence.

No such legal barriers and no such administrative obstacles exist with respect to allotted lands which are under lease or permit. The fact that departmental approval is required in the issuance of a lease or permit covering restricted lands (except where Congress has otherwise directed, as in the case of the Crow Reservation) offers a fulcrum for the exercise of a supervisory power. The exercise of such power to protect an Indian against a lessee who would injure the leased land is very different in its moral and social aspects, as well as in its strictly legal aspects, from the exercise of a similar power to protect an Indian's land against its owner. I am sure that the Indian Service will find its available energies fully engrossed in the attempt to prevent overgrazing upon tribal lands and upon such individual lands as are leased under grazing permits approved by the Department, without attempting the unauthorized and impossible task of reducing the flocks and herds that an Indian grazes on his own land.

The position taken by Solicitor Margold in the foregoing memorandum is supported by a brief filed by the Committee on Indian Civil Rights of the American Civil Liberties Union in 1932, attached to Solicitor Margold's opinion as an appendix and separately printed in part 22 of the "Survey of Conditions of the Indians in the United States."²⁰ So far as I am able to ascertain all of the regulations

²⁰ Hearings before a subcommittee of Senate Committee on Indian Affairs, 71st Cong., 2d sess., pp. 12246-7.

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issued by this Department in the field of Indian affairs under the present administration have been consistent with the views expressed by Solicitor Margold on the nature of the rights of Indian allottees.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

STATUS OF LANDS PURCHASED WITH UNRESTRICTED FUNDS OF OSAGE INDIANS

Opinion, August 25, 1942

INDIAN LANDS—OSAGE—UNRESTRICTED FUNDS—RESTRICTIONS ON ALIENATION.

Lands purchased by members of the Osage Tribe with funds not under the supervision of the Secretary of the Interior and theretofore unrestricted are unrestricted in the hands of unallotted Osage devisees.

COHEN, *Acting Solicitor*:

You [Secretary of the Interior] have requested my opinion as to whether four tracts of land in the State of New Mexico are restricted against alienation in the hands of the present owners. For the purposes of this opinion, this land will be designated as tracts 1, 2, 3, and 4, respectively, of which tracts 1 and 2 are now owned by two unallotted Osage Indians in undivided interests of one-half each and tracts 3 and 4 are owned in undivided interests of one-third each by the same two Osage Indians, the remaining one-third undivided interest being owned by a full-blood Peoria Indian.

Clara Archuleta, Osage Allottee No. 736, was the daughter of Nannie Naranjo, Osage Allottee No. 735, a full-blood Osage Indian, and Juan Naranjo, a full-blood Peoria Indian. Clara died on January 21, 1921, a resident of Rio Arriba County, New Mexico, without having received a certificate of competency, but leaving a will which was duly approved by the Secretary of the Interior on December 20, 1922. Under this will Clara devised and bequeathed to her two daughters, Mary Archuleta (now Coffman), and Josephine Archuleta (now Gilmore), all of her property in equal shares. The will designated Nannie Naranjo, mother of the decedent, as trustee "to have and receive, for the interest of my said daughters, what shall fall to them respectively under this, my will, under all the provisions thereof, until my said daughters shall separately reach the age of 21 years."

Clara died possessed of certain real property in Osage County, Oklahoma, real property in New Mexico, her Osage headright and certain moneys. Her will was duly probated in the Osage County

Court, with ancillary proceedings in Rio Arriba County, New Mexico. The record does not show how tract 1, in the town of Espanola, New Mexico, was acquired, but it was owned by Clara at the time of her death without restrictions on alienation and it is to be assumed that it was acquired by her out of the quarterly payments she received by reason of her membership in the Osage Tribe. Under the terms of her will this property passed to her two daughters, both of whom have now reached the age of 21 years.

Under the final decree of the Osage County Court, dated November 17, 1925, the executors of Clara's will were directed to pay over for the benefit of the then minor daughters, \$33,090.19. As trustee for the minor daughters, Nannie received this money and appears to have purchased tract 2 out of that sum.

At the time of her death, Nannie Naranjo held a certificate of competency. She was then a resident of New Mexico, and owned tracts 3 and 4 which, under her will approved by the Secretary of the Interior on July 13, 1933, passed in one-third undivided interests each to her granddaughters, Mary and Josephine, and to her husband, Juan.

There appears to be some question as to whether Clara's husband, the father of Mary and Josephine, had Indian blood, but Clara being a full-blood Indian, these girls have at least one-half Indian blood and are at least one-fourth Osage Indian blood.

I am of the opinion that the interests of Mary and Josephine in all four tracts are unrestricted.

With respect to tract 2, the record before me indicates that the funds with which this tract was purchased were released to the trustee for disposition free from departmental supervision and title to the tract was taken on an unrestricted deed. If this be the case, there is nothing contained in the Osage legislation which purports to impose restrictions on lands purchased in such a manner and therefore the lands are now unrestricted in the hands of the present owners.

Section 3 of the act of February 27, 1925 (43 Stat. 1008), provides that lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, shall be inalienable unless such lands are conveyed with the approval of the Secretary of the Interior. This section is made applicable to unallotted Osage Indians by section 5 of the act of March 2, 1929 (45 Stat. 1478). If tracts 1, 3 and 4 acquired in the above manner with the unrestricted funds of Clara and Nannie come within the scope of this section, they are restricted in the hands of Mary and Josephine; otherwise not. Section 3 of the 1925 act as amended, taken by itself, would seem to

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indicate that all lands received by devise under wills approved by the Secretary or inherited by unallotted Osages of one-half or more Indian blood are inalienable except with the approval of the Secretary of the Interior. However, since both the 1925 act and the 1929 act are amendatory of the basic Osage Allotment Act, these provisions must be construed *in pari materia* to ascertain the intent of Congress.

The restrictions against alienation imposed on lands of members of the Osage Tribe of Indians and their heirs are found in the act of June 28, 1906 (34 Stat. 539), and acts amendatory thereof. A brief discussion of the provisions of these acts and the decisions of the courts applicable thereto is essential to a determination of the question of whether the interests held by the Osage Indians in these lands in New Mexico are restricted or unrestricted.

In the Osage Allotment Act of 1906, *supra*, Congress provided for the allotment of the Osage lands, such lands to remain restricted for a period of twenty-five years in the hands of allottees or their heirs. *Kenny v. Miles*, 250 U. S. 58. Upon application, by an adult allottee, a certificate of competency could be granted, removing restrictions from all allotted land except the homestead of 160 acres. Under the amendatory act of April 18, 1912 (37 Stat. 86), restrictions were removed on allotted lands inherited from Osage Indians in the hands of heirs who were not members of the Osage Tribe or who had certificates of competency. Unallotted Osage Indians, i.e., those born after July 1, 1907, were not regarded as members of the tribe, and restrictions were therefore removed on all allotted lands received by them by inheritance from Osage allottees. *United States v. LaMotte*, 67 F. (2d) 788. Under the 1912 act Osage Indians were authorized to dispose of their restricted estates by will, with the approval of the Secretary of the Interior. This act was construed by the Supreme Court to remove restrictions on land devised by Osage Indians under wills approved by the Secretary of the Interior, regardless of the status of the devisee. *LaMotte v. United States*, 254 U. S. 570.

The *LaMotte* case was decided by the Supreme Court in 1921 and it was then apparent that additional legislation would be necessary to continue restrictions on lands theretofore restricted in the hands of Osage devisees. Thereafter the act of February 27, 1925 (43 Stat. 1008), was passed, which contains the following provision:

SEC. 3. Lands devised to members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and lands inherited by such Indians, shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Property of Osage Indians not having certificates of competency purchased as hereinbefore set forth shall not be subject to the

lien of any debt, claim, or judgment except taxes, or be subject to alienation, without the approval of the Secretary of the Interior.

The report of the Committee on Indian Affairs of the House of Representatives (Report No. 260, 68th Cong., 1st sess.) explains this provision as follows:

This section provides that lands devised by will, approved by the Secretary of the Interior, and lands belonging to incompetent allottees, shall not be alienated without the consent of the Secretary of the Interior, thus preventing an incompetent Indian from disposing of the land so received without adequate consideration. This section also provides that property purchased for him, either real or personal, shall be inalienable, the purpose of which is to protect the property which is purchased under supervision; as there is little object or advantage in restricting and supervising the money paid out on behalf of any allottee, if that property in which the fund is invested is not also protected.

The basic Osage legislation was further amended by the act of March 2, 1929, *supra*, to provide protection for Osage children born after July 1, 1907, who were excluded from enrollment and allotment under the Allotment Act of 1906. As time passed, enrolled members had died and their lands frequently passed to those unallotted children whose names did not appear on the final membership roll. The question of whether these unallotted Indians were bound by the restrictions applicable to allotted Indians had been the subject of controversy over a period of years and it was in order to remove any doubt as to the status of these unallotted Indians by extending to them the restrictions imposed by law for the protection of members of the tribe that Congress included in the 1929 act the following provision:

SEC. 5. The restrictions concerning lands and funds of allotted Osage Indians, as provided in this Act and all prior Acts now in force, shall apply to unallotted Osage Indians born since July 1, 1907, or after the passage of this Act, and to their heirs of Osage Indian blood, except that the provisions of section 6 of the Act of Congress approved February 27, 1925, with reference to the validity of contracts for debt, shall not apply to any allotted or unallotted Osage Indian of less than one-half degree Indian blood: *Provided*, That the Osage lands and funds and any other property which has heretofore or which may hereafter be held in trust or under supervision of the United States for such Osage Indians of less than one-half degree Indian blood not having a certificate of competency shall not be subject to forced sale to satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency: *Provided further*, That the Secretary of the Interior is hereby authorized in his discretion to grant a certificate of competency to any unallotted Osage Indian when in the judgment of the said Secretary such member is fully competent and capable of transacting his or her own affairs.

After enactment of the latter provision, the United States Circuit Court of Appeals, in *United States v. LaMotte*, 67 F. (2d) 788, held that prior to 1929 unallotted minors inherited allotted lands free from

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restrictions and that conveyances of such lands made prior to 1929 without the approval of the Secretary of the Interior were valid.

The latest act dealing with the tribal and individual affairs of the Osages is the act of June 24, 1938 (52 Stat. 1034). That act amends the original allotment act by reserving the oil, gas and other minerals to the tribe until April 1983, and continues subject to trust and supervision, the lands, moneys and other properties of the Osages, their heirs and assigns, until January 1, 1984.

Cases arising in both the Federal and State courts have called for construction and interpretation of the language of the acts of February 27, 1925, and March 2, 1929. Brief mention will be made of these cases. In *United States v. Howard*, 8 Fed. Supp. 617, in the United States District Court for the Northern District of Oklahoma, the land involved was the allotment of a deceased full-blood Osage. Partition among the heirs, also full-blood Osage allottees, without certificates of competency, had been made in accordance with the provisions of section 6 of the 1912 act. The sheriff's deed had been approved by the Secretary of the Interior as required by that act, and the question was whether the grantees under that partition could convey the real estate without the approval of the Secretary of the Interior. In attempting to ascertain the intention of Congress in section 3 of the 1925 act the court considered the report of the Congressional Committee on Indian Affairs quoted above. The court found that the report "clearly evidences an intention by Congress to *reimpose* restrictions upon all lands belonging to incompetent allottees, without respect to the manner in which such lands were acquired." [Italics supplied.]

The court said:

A reading of the act discloses that its purpose is to protect incompetent Osage allottees, and this protection comes about from a requirement of an approval of the Secretary of the Interior of conveyances. There can be no question but that Congress is authorized to *reimpose* restrictions upon lands which have become freed of such restrictions. * * * The purpose of the act plainly appears from the language employed in it; it undertook to *reimpose* restrictions upon all property whether inherited by or purchased for incompetent members of the tribe. * * *

I am of the opinion that the 1925 act of Congress *reimposed* restrictions upon all lands of incompetent Osage allottees, and that while the lands were freed in the partition proceeding, such restrictions were reimposed by section 3 of the Act of Congress of February 27, 1925. * * * [Italics supplied.]

In *United States v. Johnson*, 29 Fed. Supp. 300, also decided by the United States District Court for the Northern District of Oklahoma, the deed under discussion, by which an unallotted Osage attempted to convey, was the same deed which was discussed in an opinion by

former Solicitor Margold (M. 27963) approved by you on January 26, 1937. There the land involved was inherited in the year 1925 by Agnes Holloway, a full-blood unallotted heir without a certificate of competency, from her father, also a full-blood Osage Indian without a certificate of competency, who had inherited the land restricted from the original full-blood allottee. On the death of Agnes in 1932 her share was inherited in part by her husband, an unallotted Osage Indian of less than half Indian blood. He had not received a certificate of competency. The court reached the same conclusion as that set forth in the above-mentioned Solicitor's Opinion that as Agnes had inherited her interest prior to the enactment of the 1929 act, her interest was unrestricted under the provisions of the act of 1912, *supra*, but that the 1929 act *reimposed* restrictions in her hands and that her husband who had not received a certificate of competency inherited his share restricted in accordance with the terms of the 1929 act.

Cox v. Smith, 43 P. (2d) 439, decided by the Supreme Court of Oklahoma, involved lands which had been purchased in 1921 from his own funds by Henry Red Eagle, a full-blood Osage allottee who did not have a certificate of competency. Henry died in 1929 and under a will approved by the Secretary of the Interior these lands were devised to his unallotted granddaughter. It was contended in the brief for the Indian devisee that section 7 of the act of Congress approved April 18, 1912, *supra*, imposed restrictions upon the land purchased by Henry as soon as title vested in him, under the first portion of the section which reads:

That the lands allotted to members of the Osage tribe shall not in any manner whatsoever be encumbered, taken, or sold to secure or satisfy any debt or obligation contracted or incurred prior to the issuance of a certificate of competency, or removal of restrictions on alienation; nor shall the lands or funds of Osage tribal members be subject to any claim against the same arising prior to grant of a certificate of competency.

In answer to this contention the court referred to the decision of the Supreme Court of the United States in *LaMotte v. United States*, *supra*, in which the latter Court held that approval of leases on lands purchased by Osage Indians not having certificates of competency was not required, and quoted from the opinion of the Supreme Court, in part as follows:

* * * There is no provision in the Act of 1906 or that of 1912 which reimposes restrictions after they have been removed, or which subjects to restrictions all lands, however acquired, which a member without a certificate of competency may own.

Discussing the provisions of section 3 of the 1925 act, the State court further said:

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* * * this legislation may have been prompted by the fact that in the La Motte case, *supra*, the Supreme Court had held that a will was a method of conveyance and the approval of a will by the Secretary removed restrictions, and the act passed to provide a rule different to the conclusion in that case. However, the thought of Congress was to continue restrictions in the donee and not to impose restrictions where none existed. It continued the restrictions on the land after it passed to the Indian to whom it was willed. The language of this section is not as far-reaching in imposing restrictions on Henry Red Eagle as that of the act of 1912, which the Supreme Court held did not impose such restrictions. Therefore, this portion of this act was not broad enough to reach the lands while the title was in Henry Red Eagle.

The court also said:

The land in controversy, being unrestricted, did not require the approval of the Secretary to convey it by will. There was no law authorizing the approval of the conveyance of such land by will, and his approval of the will, so far as the land involved here was concerned, had no effect; and, therefore, this section does not apply to the conveyance of lands upon which there are no restrictions. There were no restrictions upon the land in controversy of Henry Red Eagle.

There is apparently no conflict between the Federal and State court decisions outlined above. The Federal Court cases deal with lands which were restricted in the ancestor or testator, while the State court case involved land unrestricted in the Indian from whom the property was taken by will. The Federal Court decisions, therefore, would furnish no basis for questioning the soundness of the State court decision.

It is concluded, therefore, in accordance with the holding in *Cox v. Smith, supra*, that tract 1, which was owned by Clara Archuleta in an unrestricted status at the time of her death, passed under her will to her two daughters without restrictions. Tract 2 having been purchased by the trustee of the estate of Clara Archuleta with unrestricted funds was at no time restricted prior to the passage of the act of March 2, 1929, and there are no provisions in the said act or in any other act imposing restrictions on lands of this nature. Tracts 3 and 4 belonged to Nannie Naranjo who had a certificate of competency. These tracts were unrestricted in the hands of Nannie Naranjo and there are no grounds for holding that they became restricted in the hands of her heirs or devisees.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

EMPLOYMENT OF CANADIAN CONTRACTORS FOR DRILLING IN ALASKA

Opinion, August 25, 1942

DRILLING CONTRACTS—STRATEGIC MATERIALS ACT OF JUNE 7, 1939—DOMESTIC PREFERENCE ACT OF MARCH 3, 1933—EMPLOYMENT OF CANADIAN CONTRACTORS.

In the absence of a specific statutory prohibition, there is no legal objection to the employment of Canadian contractors to drill for strategic minerals in Alaska under the act of June 7, 1939 (53 Stat. 811, sec. 7, 50 U. S. C. sec. 98f). The domestic preference act of March 3, 1933 (47 Stat. 1520, 41 U. S. C. sec. 10(b)), is not applicable since the drilling contract is not a contract for the construction, alteration, or repair of a public building or public work.

COHEN, Acting Solicitor:

The Bureau of Mines has requested to be advised concerning the legality of employing Canadian contractors on a Bureau of Mines drilling contract in Alaska, based on the following telegram from the Office of the Regional Engineer of the Bureau of Mines in Rolla, Missouri:

Advise if there is any legal objection to negotiating contract with Canadian contractors for drilling at Hyder Alaska if it can be shown US drillers unwilling to undertake or unable to move equipment to site this season. Ample Canadian equipment only twenty miles from Hyder and advantageous to the Bureau to have them do the work.

The question arises concerning drilling under the Strategic Materials Act of June 7, 1939 (53 Stat. 811, sec. 7, 50 U. S. C. sec. 98f).

The situation which necessitates the employment of foreign concerns on contracts to be performed upon United States soil is of rare occurrence. The hiring of United States companies would ordinarily be preferred as a matter of policy, and it is only when they are unavailable that the question presented would arise. Nevertheless, in the absence of a specific prohibition, there is no legal objection to such employment.

Examination of the United States Code, the 1943 Interior Appropriation Act under which the work will be executed, and cases arising under the laws of the United States discloses no statutory requirement that only native concerns be employed in contracts of the nature referred to in the telegram, and the question is not discussed at all in the Decisions of the Comptroller General or in the Opinions of the Attorney General. The only section of the statutes that might stand in the way of the performance of contracts by a Canadian concern, the section requiring the use of domestic materials by contractors contained in the act of March 3, 1933 (47 Stat. 1520, 41 U. S. C. sec.

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10(b)), is not applicable since the proposed contract is not a contract for the construction, alteration, or repair of a public building or public work.

I conclude, therefore, that there is no legal objection to the employment of Canadian contractors for drilling upon Bureau of Mines projects in Alaska under the Strategic Materials Act.

THOMAS H. FEE

Decided September 12, 1942

OIL AND GAS LEASES—RELINQUISHMENTS—ACT OF JULY 29, 1942 (56 STAT. 726).

Mere mailing of surrender of oil and gas lease is insufficient to stop accrual of rent; the Department must receive the relinquishment prior to due date of rental, but may make a compromise settlement under act of July 29, 1942 (56 Stat. 726), where financially beneficial to United States or where lessee's financial resources are limited.

CHAPMAN, *Assistant Secretary*:

This appeal involves the question whether this Department, after the date when rental on an oil and gas lease is payable to the United States, is authorized to accept, as a valid surrender of that lease, a surrender apparently never received by this Department, but alleged to have been mailed by the lessee in time for its receipt prior to the date the rental was due, and on the basis thereof, cancel the lease as of a date prior to such due date so that no rental debt would be deemed to have accrued.

Oil and gas exchange lease Las Cruces 028790 was issued to Thomas H. Fee as of December 31, 1938, under section 13 of the Mineral Leasing Act (act of February 25, 1920, 41 Stat. 437, ch. 85), as amended by the act of August 21, 1935 (49 Stat. 674, ch. 599, 30 U. S. C. (1940 ed.) sec. 221), "under such * * * conditions as are fixed in section 17" of the Mineral Leasing Act, *supra* (30 U. S. C. (1940 ed.) sec. 226). No rental is payable on such leases for the first two years unless valuable deposits of oil or gas are sooner discovered within the boundaries of the lease. No such discovery having been made within the boundaries of Fee's lease, the first rental which he was required to pay under the provisions of his lease was the rental for the third year. Section 17, *supra*, requires "payment in advance of a rental * * * of not less than 25 cents per acre per annum."

Fee's lease having been issued as of December 31, 1938, the third year's rental thus would have normally become due on January 1, 1941. By decision of January 27, 1941, the Commissioner of the General Land Office therefore required Fee to pay the third year's rental,

amounting to \$634.75, under penalty of action being taken looking to the cancelation of the lease and the collection of all moneys due thereunder. Notice of the decision was served on February 6, 1941. No response having been made thereto, the Commissioner on April 17, 1941, recommended that the lease be canceled for failure to pay the third year's rental. On May 14, 1941, the Assistant Secretary approved the cancelation of the lease. Thereafter, by letter of June 4, 1941, the Commissioner notified both Fee's attorney and Fee's surety that the lease had been canceled and again demanded payment of the third year's rental under penalty of action being taken to institute proceedings to secure collection thereof.

Before considering the legal issue here involved, the Department notes that Fee's appeal, filed on July 18, 1941, was not presented within the time limit prescribed by Rule 76 of the Departmental Rules of Practice which requires that notice of appeal "must be * * * filed * * * within 30 days from the date of service of notice of such decision" of the General Land Office. 43 CFR 221.75. The appeal, actually, is from the Commissioner's decision of January 27, 1941, not from his letter of June 4, 1941. There is nothing in the record to show any excuse for the failure to take any action or to appeal from the decision of January 27. In the exercise of its discretion, however, this Department will disregard the technicality of Fee's failure to file his appeal within the prescribed time limits and shall base this decision solely on the merits of the legal question involved.

Fee's appeal sets forth under oath the following allegations of fact: On or about December 2, 1940, Fee's attorney mailed to him a form of surrender to be executed by him as lessee. On or about December 16, 1940, the secretary of Fee's attorney telephoned Fee, calling his attention to the fact that if he did not desire to pay the third year's rental, the surrender form should be executed and mailed to the register of the District Land Office at Las Cruces, New Mexico. Fee, a house painter, realizing that he was in no condition financially to pay the rental for the year 1941, then discussed the matter with his wife and they both agreed that it would be better to surrender the lease than to pay the rental. Thereupon, some time between December 16 and 24, 1940, he took particular pains to execute the surrender form, to place it in a stamped envelope addressed to the register at Las Cruces, New Mexico, and to mail it at the post office in Roswell, New Mexico. Fee distinctly remembers that after he had mailed the surrender he telephoned his attorney's office and advised the attorney's father that the surrender had been mailed. Fee states that since the register has made demand for payment, it appears that the surrender

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was lost in the mail. Fee therefore requests that the surrender be accepted as of the time it should have reached the United States District Land Office at Las Cruces, New Mexico, *i.e.*, prior to December 31, 1940.

Fee's appeal is corroborated by an accompanying affidavit by his wife, and by his attorney's letter of June 19, 1941, addressed to the Commissioner of the General Land Office, setting forth a similar history in connection with the surrender of the lease and further stating that had she (Fee's attorney) not been seriously ill, having to depend upon her secretary to do most of her office work, she would have personally taken the surrender to him, have secured his signature, and then have personally mailed it. Because of her illness, she had mailed the surrender to the lessee and then had had her secretary telephone him on or about December 16, 1940, reminding him of the importance of executing and mailing the surrender form. Fee also filed, in the form of an application, an affidavit executed on June 19, 1941, relating similar facts.

By letter of August 14, 1941, the Commissioner, reciting these allegations, requested the register of the Las Cruces District Land Office to make a diligent search for the surrender. The latter replied on August 19, 1941, that a diligent search of his records failed to reveal that a surrender had ever been received.

Fee's offer of surrender was but an offer, to be accepted in the discretion of the Secretary, and it is well established in the law of contracts that an offer, to be effective, must be communicated. 1 Williston on Contracts, sec. 33, p. 84 (Rev. ed. 1936); Restatement of Contracts, sec. 23. While the Department retroactively accepts an offer of surrender as of the day of its *receipt*, it would be stretching the beneficial exercise of its authority beyond the limits of elasticity to consider a relinquishment as having been received merely because it had been mailed. Had he filed a surrender with this Department prior to January 1, 1941, this Department would have accepted the surrender, and the lease would have been terminated as of a date prior to the accrual of Fee's liability thereon. There is nothing in the record indicating any cause for this Department to have refused to accept such a surrender. But since no such surrender appears to have been actually received by this Department prior to the due date of the rental, that rental must be considered, on the basis of the present record, to have become a debt due to the United States. Letter of Instructions, June 12, 1941, *in re The Howells*, Las Cruces 051301, 051304; *Diwie Cole*, A. 23185, Los Angeles 051714 (January 29, 1942); *P. L. Larquier*, A. 23177, Santa Fe 069450 (January 29,

1942); *Robert E. O'Keefe*, 57 I. D. 216 (A. 22683, Great Falls 081768, November 30, 1940).

It is noted, however, that Fee has alleged that he is a house painter and is not financially able to pay the rental for the year 1941. Section 2 of the act of July 29, 1942 (56 Stat. 726), provides as follows:

The Secretary of the Interior is authorized to make a compromise settlement of any claim for accrued rental under a lease issued pursuant to the provisions of section 13 of such Act of February 25, 1920, as amended, in any case in which he determines that it would be financially beneficial to the United States to make such a compromise settlement or in any case in which he determines that collection of the full amount of such accrued rental from the lessee is inadvisable because of the lessee's financial resources being limited.

In order to afford the lessee an opportunity to take advantage of this provision of the law if he considers it applicable to his case, the Commissioner, upon return of this case to his office, will notify Fee of the manner and form in which any petition for compromise under the act of July 29, 1942, *supra*, may be filed, and accord him reasonable opportunity in which to file such petition.

As so modified, the decision of the Commissioner of the General Land Office is affirmed.

Modified.

STATE OF WYOMING

Decided September 18, 1942

SCHOOL LAND—ACTS OF JULY 10, 1890 AND JANUARY 25, 1927—RIGHT-OF-WAY—
ACTS OF JULY 1, 1862 AND MARCH 8, 1922.

In connection with an application for exchange under section 8 of the act of June 28, 1934 (48 Stat. 1269), the State of Wyoming tendered a quitclaim deed to a portion of school Sec. 36, subject to the right-of-way of the Union Pacific Railroad Company over the land and to a reservation to itself, its successors and assigns, of all minerals and mineral rights in the premises described in the deed with the right to prospect for, mine and remove the same. The State acquired the land either under its grant in the enabling act of July 10, 1890 (26 Stat. 222), if not known to be mineral at the date of said act, or under the act of January 25, 1927 (44 Stat. 1026), if known to be mineral at the first-mentioned date. The right-of-way was granted in 1869 under the land grant to the Northern Pacific Railroad Company of July 1, 1862 (12 Stat. 489). The State in its application disclaimed any interest in any minerals that might be in the right-of-way. Nevertheless, the Commissioner of the General Land Office as a condition to the acceptance of the deed required the State to file a quitclaim deed to the minerals within the right-of-way.

Held: (1) That the State took title under its grant subject to the right-of-way. (2) That the estate of the railroad was a limited fee on the implied condition of reverter in the event the company ceases to use or

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retain the land for the purposes for which it was granted. *E. A. Crandall*, 43 L. D. 556; *Northern Pacific Railway Company v. Townsend*, 190 U. S. 267, cited and applied. *Great Northern Railway Company v. United States*, 315 U. S. 262, distinguished. (3) That if the State acquired the land under the act of July 10, 1890, its deed of the land conveyed no right, title or interest in the right-of-way, but, if on the other hand the State acquired the land under the act of January 25, 1927, certain provisions of subsection (c) thereof as amended by the act of May 2, 1932 (47 Stat. 140), might mean that the grant would take effect upon the railroad right-of-way extinguished by forfeiture or abandonment were it not for the provisions of the act of March 8, 1922 (42 Stat. 414). (4) That so far as the question as to whom the land is to go upon extinguishment of the right-of-way is concerned, the act of 1927 is general, whereas the act of 1922 is special relating only to the extinguishment of rights-of-way; that the act of 1927 does not purport to repeal the act of 1922 and there is no inconsistency between the two acts and, therefore, the act of 1927 will not be construed as repealing the act of 1922. *United States v. Nix*, 189 U. S. 199; *Ex parte United States*, 226 U. S. 420; *Rodgers v. United States*, 185 U. S. 83; *Washington v. Miller*, 235 U. S. 422, cited and applied. (5) That as the act of 1922 provides for the vesting of title in the land in the right-of-way to the person, etc. who holds the title to the land crossed by the right-of-way at the time of its extinguishment with reservation of mineral to the United States, the State would acquire no interest in the right-of-way under the act of 1927; that what interest it would acquire would be only under the act of 1922; but since the State by its deed to the United States divests itself of the land crossed by the right-of-way, the State could not acquire any interest therein under the act of 1922. (6) That the State has no present interest in the right-of-way and after the proffered deed is accepted it will not be able to acquire any interest therein under the act of 1922 in the future. (7) That as the deed conveys the land subject to the right-of-way and as the disposition of the land and minerals therein, upon extinguishment of the right-of-way is governed by the act of March 8, 1922, it is not so ambiguous in form as to cast any cloud on the title of the United States as to any minerals in the right-of-way, and a deed quitclaiming such minerals will not be required.

CHAPMAN, *Assistant Secretary*:

The State of Wyoming filed an application under section 8 of the act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976), to exchange, among other lands, on an equal acreage basis, the W $\frac{1}{2}$ and SE $\frac{1}{4}$ Sec. 36, T. 18 N., R. 115 W., 6th P. M., for certain tracts of public land. Section 8(c) of said act provides that "in making exchanges of equal acreage the Secretary of the Interior is authorized to accept title to offered lands which are mineral in character, with a mineral reservation to the State."

The State tendered a deed quitclaiming all its estate, right, title, interest and possession to, among other tracts, "W $\frac{1}{2}$: SE $\frac{1}{4}$ Sec. 36, T. 18 N., R. 115 W. * * * subject to the right of way of the Union Pacific Railroad Company's right of way over the SE $\frac{1}{4}$," and a

reservation to itself, its successors and assigns, of all minerals and mineral rights in the premises described in the deed and the right of ingress and egress to said premises and the use of so much of the surface thereof as may be necessary to prospect for, develop and remove such mineral or any part thereof.

The records of the General Land Office show the Union Pacific Railroad Company's right-of-way as passing in the vicinity of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 36, T. 18 N., R. 115 W. The map showing the profile of the right-of-way was accepted by the President of the United States on February 9, 1869, and duly filed in the office of the Commissioner. The official plat of survey of the township approved July 13, 1874, shows the line of the railroad of the Union Pacific Railroad Company passing through said SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 36. The Union Pacific Railroad Company was granted the right-of-way by the act of July 1, 1862 (12 Stat. 489), together with subsidy lands. The grant was present and absolute and upon identification of the route, took effect as of the date of the act (*Nadeau v. Union Pacific R. R. Co.*, 253 U. S. 442, 446), and all persons acquiring any portion of the public lands after the passage of the act in question took the same subject to the right conferred by it for the purpose of the road. *Railroad Company v. Baldwin*, 103 U. S. 426, 430; *Bramwell v. Central and Union Pacific Railroad Companies*, 2 L. D. 844; *Southern Pacific Co. v. City of Reno*, 257 Fed. 450.

The Land Department uniformly has ruled that the States acquire vested rights in all school sections in place which are not otherwise appropriated and not known to be mineral at the time of survey, or at the date of the grant where the survey precedes it (*Wyoming v. United States*, 255 U. S. 489, 500). The title of the State to the land in Sec. 36 was acquired under the act of July 10, 1890 (26 Stat. 222), providing for the admission of the State into the Union, and its rights became vested upon the date of admission of the State under said act, if the land was not then known to be mineral in character. If the lands at said last-mentioned date were known to be mineral in character, the title of the State vested under the act of January 25, 1927 (44 Stat. 1026), which extended the several grants to the States of numbered school sections in place to embrace such numbered school sections mineral in character. See *School Lands*, 53 I. D. 30, 32; *Scharf & Havenstrite*, 57 I. D. 348.

By decision of May 12, 1941, the Commissioner of the General Land Office held that—

The right of the company to the right-of-way vested on July 1, 1862, the date of the grant and became fixed as to the particular tract by the filing of the map of constructed road opposite thereto and is superior to any right or claim to land embraced in it which was not legally and validly initiated prior

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to July 1, 1862. Therefore, the State did not acquire any right, title or interest in or to the land covered by the above right-of-way or any minerals which may be in the land covered by the right-of-way, under the school land laws.

In view of the foregoing, it will be necessary for the State to file a quitclaim deed to the minerals reserved by the deed of conveyance mentioned above as to the part of the SE $\frac{1}{4}$ Sec. 36, T. 18 N., R. 115 W., included in the Union Pacific Railroad right-of-way.

In response to this requirement the Commissioner of Public Lands of the State said:

Our deed of conveyance executed and dated December 4, 1940, conveyed title, with other lands, to the W $\frac{1}{2}$:SE $\frac{1}{4}$ Sec. 36, T. 18 N., R. 115 W., *subject to the right-of-way of the Union Pacific Railroad Company's right-of-way over the SE $\frac{1}{4}$.*

The State of Wyoming has in no way and at no time claimed ownership to either the surface or mineral rights in the land contained in the right-of-way of the Union Pacific Railroad Company over the SE $\frac{1}{4}$ Sec. 36, T. 18 N., R. 115 W., nor did the State of Wyoming in its deed of conveyance above mentioned convey title to any part of said right-of-way land. However, if it is still your desire that we file a disclaimer to the mineral rights in the right-of-way of the Union Pacific Railroad Company, we can see no objection if you will furnish the form of instrument desired.

* * * * *

Since the State of Wyoming has never claimed title to either the surface or the mineral rights in and to the land contained in the right-of-way of the Union Pacific Railroad over the SE $\frac{1}{4}$ Sec. 36, T. 18 N., R. 115 W., it is respectfully requested that the decision be modified and our application Cheyenne Serial No. 060453 be approved for patenting.

The Commissioner of the General Land Office by letter of June 11, 1941, advised the Commissioner of Public Lands of the State as follows:

The State took sec. 36 and the minerals therein under the school land laws, subject to the right-of-way, which was only a limited fee based on an implied condition of reverter in the event the company ceases to use or retain the land for the purpose for which it was granted. The company cannot dispose of any part of the right-of-way and if it is abandoned or forfeited, the reverter mentioned above will be to the legal holders of the land subservient to the right-of-way. It will, therefore, be necessary for the State to furnish a quitclaim deed to the minerals in the SE $\frac{1}{4}$ sec. 36, T. 18 N., R. 115 W., because all minerals were reserved to the State by the deed mentioned above.

The State has appealed and assigns error—

in that the State's application for exchange was based on equal acreage and as subsection (c) of Section 8 of the Taylor Grazing Act approved June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (Public No. 827), provides that "When an exchange is based on lands of equal acreage and the selected lands are mineral in character, the patent thereto shall contain a reservation of all minerals to the United States; and in making exchanges of equal acreage the Secretary of the Interior is authorized to accept title to

offered lands which are mineral in character, with a mineral reservation to the State", there should be no question as to the title to the mineral rights and it was wrong to require title to said mineral rights.

It requests an opinion as to the final disposition of the title to the surface and mineral in and to the land in the right-of-way in case of abandonment or forfeiture thereof and that its deed be accepted without the requirement that a quitclaim deed to the minerals in the right-of-way be tendered.

The holding of the Commissioner that the estate of the railroad company is a limited fee on an implied condition of reverter in the event the company ceases to use or retain the land for the purpose for which it was granted, is in accord with the holding in *E. A. Crandall*, 43 L. D. 556, which following the doctrine announced in *Northern Pacific Railway Company v. Townsend*, 190 U. S. 267, so characterized the estate of that company in its right-of-way under its grant. The grant of a right-of-way to the Union Pacific Railroad Company is contained in a land grant act similar to that granted to the Northern Pacific Railroad Company, and upon comparison of the two grants there is no good reason for believing that there is any difference in the character of the estate in a right-of-way granted under either of those grants.

In the case of *Great Northern Railway Company v. United States*, 315 U. S. 262, the Supreme Court of the United States held the general right-of-way statute (act of March 3, 1875, 18 Stat. 482), granted only an easement, but upon examination of the opinion in that case nothing is seen that manifests a change of view as to the character of the estate in rights-of-way conveyed by the earlier land grant acts to the railroads. The Court said that beginning in 1850 Congress had embarked on a policy of subsidizing railroad construction by lavish grants from the public domain, the act of July 1, 1862, here in question being mentioned in the footnote as one of the examples of such lavish grants, with the observation that:

In view of this lavish policy of grants from the public domain it is not surprising that the rights of way conveyed in such land-grant acts have been held to be limited fees. *Northern Pacific Ry. Co. v. Townsend*, 190 U. S. 267.

Further along in the opinion it is said:

When Congress made outright grants to a railroad of alternate sections of public lands along the right of way, there is little reason to suppose that it intended to give only an easement in the right of way granted in the same act.

The holding that only an easement for right-of-way was granted under the general right-of-way statute was placed on the ground that there had been a change of congressional policy from that which actuated the earlier special grants to railroads. The recent decision

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of the Supreme Court mentioned is not considered as applicable to the rights-of-way granted under the act of July 1, 1862. The holding of the Commissioner as to the character of the estate in the right-of-way in question is therefore correct.

The grant of the numbered school sections to the State by the act of July 10, 1890, does not apply to land "sold or otherwise disposed of." If the State therefore acquired the land purporting to be conveyed by its proposed deed under that grant, the grant conveyed no right, title or interest in the right-of-way and, therefore, the deed would be ineffectual to convey any such right, title or interest. On the other hand, if the State acquired the land under the grant of January 25, 1927, *supra*, the provisions of subsection (c) of its granting clause, as amended by the act of May 2, 1932 (47 Stat. 140), excluding from the provisions of the act, among other lands, those "subject to or included in any valid application, claim, or right initiated or held under any of the existing laws of the United States, *unless or until such reservation, application, claim, or right is extinguished, relinquished, or canceled, * * **" [Italics supplied], might mean that the grant would take effect upon a railroad right-of-way extinguished by forfeiture or abandonment, were it not for the provisions of the act of March 8, 1922 (42 Stat. 414). So far as the question as to whom the land is to go upon the extinguishment of the railroad's right-of-way is concerned, the act of 1927 is general in that it relates to extinguishment of all types of prior rights and claims, whereas the act of 1922 is quite specific in that it relates only to extinguishment of railroad rights-of-way. The act of 1927 does not expressly purport to repeal the act of 1922, nor is there any necessary inconsistency between the two acts. Therefore, the 1927 act will not be construed to effect a repeal of the 1922 act. *United States v. Nix*, 189 U. S. 199; *Ex parte United States*, 226 U. S. 420; *Rodgers v. United States*, 185 U. S. 83; *Washington v. Miller*, 235 U. S. 422.

So far as pertinent here the act of 1922 provides:

That whenever public lands of the United States have been or may be granted to any railroad company for use as a right of way for its railroad or as sites for railroad structures of any kind, and use and occupancy of said lands for such purposes has ceased or shall hereafter cease, whether by forfeiture or by abandonment by said railroad company declared or decreed by a court of competent jurisdiction or by Act of Congress, then and thereupon all right, title, interest, and estate of the United States in said lands shall, except such part thereof as may be embraced in a public highway legally established within one year after the date of said decree or forfeiture or abandonment be transferred to and vested in any person, firm, or corporation, assigns, or successors in title and interest to whom or to which title of the United States may have been or may be granted, conveying or purporting to convey the whole of the

legal subdivision or subdivisions traversed or occupied by such railroad or railroad structures of any kind as aforesaid, except lands within a municipality the title to which, upon forfeiture or abandonment, as herein provided, shall vest in such municipality, and this by virtue of the patent thereto and without the necessity of any other or further conveyance or assurance of any kind or nature whatsoever: * * * *Provided further*, That the transfer of such lands shall be subject to and contain reservations in favor of the United States of all oil, gas, and other minerals in the land so transferred and conveyed, with the right to prospect for, mine, and remove same.

As this act provides for the vesting of title in the land in the right-of-way to the person, etc., who holds the title to the land crossed by the right-of-way at the time of its extinguishment with reservation of the minerals to the United States, the State would acquire no interest in the right-of-way under the act of 1927. Whatever interest in the right-of-way the State could acquire would be only under the act of 1922. But since the State, by its deed to the United States, divests itself of the land crossed by that portion of the right-of-way here involved, the State could thereafter not secure any interest therein under the act of 1922.

The State has, therefore, no present interest in the right-of-way and after the proffered deed is accepted it will not be able to acquire any such interest under the 1922 act in the future. Hence, the deed conveys none and the reservation of minerals affects only such lands as are actually conveyed.

As to the question whether the form of the deed, in the event the right-of-way were abandoned, would cast a cloud on the title of the United States as to any minerals it may contain, it is observed that the deed conveys the SE $\frac{1}{4}$ Sec. 36 subject to the right-of-way, and as the disposition of the land and minerals therein upon the extinguishment of the right-of-way is governed by the act of March 8, 1922, it is not believed that it is ambiguous as to the area in which it purports to reserve the minerals. There does not seem to be any disagreement between the State and the Department as to proper construction of the deed. The possibility of any controversy as to purport and effect of the deed seems, therefore, very remote.

The decision of the Commissioner is reversed and, if otherwise found regular, the selection may be approved.

Reversed.

CITIZENSHIP STATUS OF PUERTO RICANS UNDER THE NATIONALITY ACT OF 1940

Opinion, September 24, 1942

PUERTO RICANS—CITIZENSHIP STATUS—TREATY PROVISIONS—ORGANIC ACTS—
NATIONALITY ACT OF 1940.

September 24, 1942

A person born in Puerto Rico of native parents prior to its cession by Spain to the United States under the treaty of peace ratified on April 11, 1899, who did not elect thereunder to remain a subject of Spain, became a citizen of Puerto Rico under the provisions of the Foraker Act of April 12, 1900 (31 Stat. 77, 79, 48 U. S. C. sec. 733), and acquired the status of a naturalized citizen of the United States under the provisions of the Jones Law of March 2, 1917 (39 Stat. 951, 953, 8 U. S. C. sec. 602, note).

PUERTO RICANS—CITIZENSHIP STATUS—NATIONALITY ACT OF 1940—EFFECT OF ABSENTEEISM.

A Puerto Rican who has become a naturalized United States citizen in the aforementioned manner is subject to the provisions of section 404(c) of the Nationality Act of 1940 and hence will lose his nationality if he has resided continuously for five years in any foreign state, unless he returns to the United States before two years after the date of the approval of that act.

COHEN, *Assistant Solicitor*:

Reference is made to your [Assistant Secretary] memorandum of August 29, requesting my suggestions on certain enclosures concerning the citizenship status of Mr. Alberto V. Malaret, of Puerto Rico, presently of Havana, Cuba. I have reviewed the copy of the letter of August 14, addressed by Mr. Malaret to the State Department and transmitted to you by Dr. Tomas Cajigas, of Washington, D. C. Dr. Cajigas requests your opinion concerning certain questions raised by Mr. Malaret.

Mr. Malaret's letter states that he was born in Puerto Rico on May 11, 1892, of Puerto Rican parents. While he does not so indicate, it appears that his parents were subjects of Spain, residing in Puerto Rico at the time of his birth, who, under the provisions of the treaty of peace between the United States and Spain, ratified on April 11, 1899, did not formally elect to remain Spanish subjects and thereby became citizens of Puerto Rico. It appears that Mr. Malaret has lived for some time in Havana, Cuba, where he conducts an insurance business, and that he is concerned over the citizenship status of native Puerto Ricans who were born prior to April 11, 1899, who have become naturalized citizens of the United States, but who are now living abroad, in view of certain provisions of the Nationality Act of 1940.

The question for consideration is whether the United States citizenship conferred upon native Puerto Ricans under the treaty with Spain, ratified on April 11, 1899, and subsequent legislation enacted by the Congress of the United States, gave them the status of naturalized citizens, thereby making them subject to the provisions of the Nationality Act of 1940, particularly section 404(c), which provides that naturalized citizens of the United States shall lose their nationality by residing continuously for five years in any other foreign state.

It is my opinion that Mr. Malaret is a naturalized citizen of the United States and that he therefore is subject to the provisions of the Nationality Act of 1940. Accordingly, if he has failed to return to the United States within two years after the date of the approval of that act, after having resided continuously for five years in Havana, Cuba, or any other foreign state, he will lose his United States nationality.

The pertinent statutory provisions involving the United States citizenship status of Puerto Ricans in Mr. Malaret's circumstances are as follows:

Article IX of the treaty of peace between the United States and Spain, ratified April 11, 1899 (30 Stat. 1754), providing that—

Spanish subjects, natives of the Peninsula, residing in the territory over which Spain by the present treaty relinquishes or cedes her sovereignty, may remain in such territory or may remove therefrom, retaining in either event all their rights of property, including the right to sell or dispose of such property or of its proceeds; and they shall also have the right to carry on their industry, commerce and professions, being subject in respect thereof to such laws as are applicable to other foreigners. In case they remain in the territory they may preserve their allegiance to the Crown of Spain by making, before a court of record, within a year from the date of the exchange of ratifications of this treaty, a declaration of their decision to preserve such allegiance; in default of which declaration they shall be held to have renounced it and to have adopted the nationality of the territory in which they may reside. The civil rights and political status of the native inhabitants of the territories hereby ceded to the United States shall be determined by the Congress.

The Organic Act of Puerto Rico, commonly known as the Foraker Act (act of April 12, 1900, 31 Stat. 77, 48 U. S. C. sec. 731, *et seq.*), providing in part as follows:

SEC. 7. That all inhabitants continuing to reside therein who were Spanish subjects on the eleventh day of April, eighteen hundred and ninety-nine, and then resided in Porto Rico, and their children born subsequent thereto, shall be deemed and held to be citizens of Porto Rico, and as such entitled to the protection of the United States, except such as shall have elected to preserve their allegiance to the Crown of Spain on or before the eleventh day of April, nineteen hundred, in accordance with the provisions of the treaty of peace between the United States and Spain entered into on the eleventh day of April, eighteen hundred and ninety-nine; and they, together with such citizens of the United States as may reside in Porto Rico, shall constitute a body politic under the name of The People of Porto Rico, with governmental powers as hereinafter conferred, and with power to sue and be sued as such.

The present Organic Act of Puerto Rico, commonly known as the Jones Law (act of March 2, 1917, 39 Stat. 953, 8 U. S. C. sec. 602 (note)), providing in part as follows:

September 24, 1942

SEC. 5. That *all citizens of Porto Rico*, as defined by section seven of the Act of April twelfth, nineteen hundred, "temporarily to provide revenues and a civil government for Porto Rico, and for other purposes," and all natives of Porto Rico who were temporarily absent from that island on April eleventh, eighteen hundred and ninety-nine, and have since returned and are permanently residing in that island, and are not citizens of any foreign country, are hereby declared, and *shall be deemed and held to be, citizens of the United States.* * * * [Italics supplied.]

The Nationality Act of 1940 (act of October 14, 1940, 54 Stat. 1137, 8 U. S. C. sec. 501, *et seq.*), providing in part as follows:

SEC. 404. A person who has become a national by naturalization shall lose his nationality by:

* * * * *

(c) Residing continuously for five years in any other foreign state, * * *.

* * * * *

Sec. 409. Nationality shall not be lost under the provisions of section 404 * * * of this Act until the expiration of two years following the date of the approval of this Act: * * *.

On the basis of the information submitted, it appears that Mr. Malaret and his parents were native inhabitants of and residing in Puerto Rico on April 11, 1899, when the treaty of peace between the United States and Spain was ratified. There is no evidence that, in accordance with the treaty provisions, his parents elected to remain subjects of Spain or that he so elected upon reaching his majority. It seems clear, therefore, that under the provisions of the Foraker Act of 1900, *supra*, Mr. Malaret became a citizen of Puerto Rico and that he later attained United States citizenship under the provision of the Jones Act of 1917, *supra*, to the effect that "all citizens of Porto Rico * * * shall be deemed and held to be, citizens of the United States."

Section 101(a) of the Nationality Act of 1940 defines the term "national" as meaning "a person owing permanent allegiance to a state." Section 101(c) defines the term "naturalization" as meaning "the conferring of nationality of a state upon a person *after birth.*" [Italics supplied.] Inasmuch as Mr. Malaret was born prior to the cession by Spain of Puerto Rico to the United States and attained his United States citizenship under the treaty of peace ratified April 11, 1899, and subsequent legislative enactments, it appears to be established without question that he is a "naturalized" citizen or "national" of the United States. Section 404(c) provides in unequivocal language that a person who has become "a national by naturalization" shall lose his nationality by "residing continuously for five years in any other foreign state * * *." Since Mr. Malaret

is a naturalized citizen, it follows that he is subject to the provision of the act.

In view of the foregoing it is my opinion that since Mr. Malaret is a naturalized citizen of the United States, and therefore subject to the provisions of the Nationality Act of 1940, he will have lost his United States nationality by residing continuously for five years in Cuba unless he returns to the United States before two years after the date of the approval of that act, or October 14, 1942.

* * * * * *

ROY EVERETT LADD

Decided September 25, 1942

MILITARY SERVICE—SOLDIERS' AND SAILORS' CIVIL RELIEF ACT OF 1940.

Applicant for homestead entry entered military service while an appeal was pending before the Department from the decision of the Commissioner of the General Land Office rejecting his application. *Held*, (1) where an appeal is filed and perfected by an applicant for homestead entry prior to his entrance into the military service, action on the appeal in the regular course is not stayed by notice of military service; (2) in order for administrative action to be suspended in a public land proceeding involving a person in the military service it must appear that if action is taken in the regular course the initiated or acquired rights of such a person may, by reason of the fact that he is in the military service, be prejudiced thereby; (3) where an applicant for homestead entry in the military service is entitled by departmental regulations to a rehearing but, before filing and perfecting a motion for rehearing, he requests that final action on the entry be suspended during the period of his military service, action on the rehearing will be suspended during the period of military service, unless the applicant subsequently elects to proceed with the case during his service period.

CHAPMAN, *Assistant Secretary*:

Roy Everett Ladd filed an appeal, dated June 23, 1941, from the decision of the Acting Assistant Commissioner of the General Land Office, dated January 10, 1941, holding his application for homestead entry, Las Cruces 057738, for rejection. The Acting Assistant Commissioner held that the land in question is more valuable for the production of native grasses and forage plants than for the production of agricultural crops. On appeal the applicant submits in support of his application his own affidavit and the affidavits of two farmers in the vicinity. These affidavits state in substance that the land is more adapted for agriculture than for grazing and that beans have been successfully grown on similar lands in the vicinity.

A letter dated July 10, 1941, from Senator Hatch, to the Commissioner of the General Land Office, states that Roy Everett Ladd is now in the armed services of the United States. The Senator also states that he received a communication from Private Ladd in which the applicant expresses the belief that he should be given consideration under the Soldiers' and Sailors' Civil Relief Act of 1940, "to the extent that final disposition of his application be withheld until his release from military service."

Section 501 of the Soldiers' and Sailors' Civil Relief Act of 1940 (54 Stat. 1187, 50 U. S. C. sec. 561), provides:

(1) No right to any lands owned or controlled by the United States initiated or acquired under any laws of the United States, * * * by any person prior to entering military service shall during the period of such service be forfeited or prejudiced by reason of his absence from the land or his failure to perform any work or make any improvements thereon or his failure to do any other act required by or under such laws.

Whether or not a "right to any lands" has been initiated by the application for classification and for homestead entry is the very question which the appeal raises for determination.

Unquestionably the act contemplates that action on applications to make entry may in certain circumstances be taken during the period of military service. Sections 502 and 503 of the act fix and define rights of applicants who enter the military service and whose applications "may thereafter be allowed," and section 507 of the act provides that:

Nothing in this article shall be construed to limit or affect the right of a person in military service to take any action during his period of service which may be authorized by law or the regulations of the Department of the Interior for the perfection, defense, or further assertion of rights initiated or acquired prior to the date of entering military service. It shall be lawful for any person while in such service to make any affidavit or submit any proof which may be required by law or the practice or regulations of the General Land Office in connection with the entry, perfection, defense, or further assertion of any rights initiated or acquired prior to entering such service, before the officer in immediate command and holding a commission in the branch of the service in which the person is engaged. Such affidavits shall be as binding in law and with like penalties as if taken before a register of a United States land office. The Secretary of the Interior may issue rules and regulations to effectuate the purposes of sections 501 to 512, inclusive.

Since section 507 provides that persons in the military service may take action in "defense, or further assertion of rights initiated or acquired prior to the date of entering military service" it seems clear that it was contemplated, at least in cases where such action is taken, that the Department may consider the case on its merits and take

appropriate action. It seems equally clear that where an appeal or other action is taken by a party to a proceeding before he enters the military service and he has performed all those acts required or permitted before administrative action may be taken, the Department should, in the regular course, consider and dispose of the matter on its merits. In other words, in order for administrative action to be suspended in a public land proceeding involving a person in the military service it must appear that if action is taken in the regular course the initiated or acquired rights of such a person may, by reason of the fact that he is in the military service, be prejudiced thereby.

The present appeal appears to have been duly filed and fully perfected prior to the date that the applicant entered the military service. It has not been suggested that the appellant desires or intends to submit any further showing on the appeal. There seems to be no reason, therefore, why the appeal should not be taken up and considered on its merits.

The Office of Land Utilization, of this Department, after carefully considering the evidence now in the record, recommends that the decision of the General Land Office be sustained for the following reasons:

1. The area involved in this entry is located in a semi-arid section of New Mexico where irrigation is essential in securing sustained crop production.

2. No water for irrigation is available at a reasonable cost. While the average annual precipitation is between 13 and 14 inches, there have been a number of years when the precipitation was less than 10 inches and sometimes as low as 3 inches. Furthermore, it is largely deficient during the growing season.

3. Type of soil is a sandy loam of volcanic composition, highly erodable when cultivated or denuded of a protective cover.

4. The land is unquestionably marginal in character for profitable production of agricultural crops and a well-sustained livelihood. Dry farming in such areas is a hazardous undertaking and would be detrimental to the soil.

In view of the recommendation of the Office of Land Utilization, and the reasons given in support thereof, the decision of the General Land Office is affirmed.

This action is, however, not final since the applicant has the right, by reason of the regulations of the Department, to file a motion for rehearing. See Rule 83 of the Rules of Practice (43 CFR 221.81). An applicant should receive full opportunity to submit on a motion for rehearing such additional facts and further evidence as may be obtainable tending to show that the land is suitable for the purposes stated in the application. Unquestionably, an applicant in the military service would be handicapped during the period of his service in securing further evidence to support his application and might

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be otherwise prejudiced with respect thereto if final action were taken in the matter during such period. In fact, circumstances may be such as to preclude an applicant in the service from filing a motion for rehearing until after his release, and section 501 of the relief act excuses the failure to do *any act* required by or under the law during the service period. Consequently, it is believed that in the present case the applicant's request that final disposition of his application be withheld until his release from the military service should be granted.

Further action on the application will therefore be suspended during the period of military service, which, according to the act, "shall terminate at the date of discharge from active service or death while in active service, but in no case later than the date when this act ceases to be in force."

So Ordered.

THE MINE AND SMELTER SUPPLY COMPANY

Decided October 3, 1942

CONTRACTS—DAMAGES—LIQUIDATED—SHIPMENT PROVISION—WHAT CONSTITUTES SHIPMENT.

An assessment of liquidated damages was made by the contracting officer for a delay of 38 days, 31 days of which was on the basis that delivery to a carloading company did not constitute shipment within the terms of the contract. *Held*, that the action of the contractor, through its subcontractor, in relinquishing all control over the equipment to the carloading company and the prompt movement of the equipment by that company constituted shipment. Liquidated damages for a 31-day delay between actual relinquishment for such shipment and the contract shipment date were properly assessed. The assessment for the additional 7-day period was improper and should be remitted.

FORTAS, *Under Secretary*:

On April 30, 1941, the Bureau of Reclamation entered into a contract with The Mine and Smelter Supply Company, of Denver, Colorado, for the shipment of certain cable equipment. The contract required that the equipment be delivered f.o.b. cars at Yuma, Arizona, and that shipment be made from Marion, Indiana, within 45 calendar days after the date of the receipt of notice of award of the contract, of which the contractor was advised by Bureau of Reclamation letter of April 30, 1941, received on May 1, 1941, thus establishing the shipping date as June 15, 1941.

Complete shipment was made from Marion, Indiana, on July 16, 1941, by the Universal Carloading and Distributing Company, which consigned the material to itself at Phoenix, Arizona. On arrival in

Phoenix, Arizona, on July 23, 1941, the equipment was shipped, apparently without delay, to the Bureau of Reclamation at Yuma, Arizona.

The contracting officer, in making payment, deducted liquidated damages at the rate of \$5 per day for 38 days, representing the delay between June 15, 1941, the contract date of shipment from Marion, Indiana, and July 23, the date upon which the equipment was shipped by the Universal Carloading and Distributing Company, from Phoenix, Arizona, consigned to the Bureau of Reclamation at Yuma, Arizona. By letter of September 10, 1941, the contractor protested the deduction of \$35, representing 7 days' liquidated damages, contending that the shipment by the Anaconda Wire & Cable Company, its subcontractor, which utilized the facilities of the Universal Carloading and Distributing Company from Marion, Indiana, constituted "shipment" under the terms of the contract and that therefore the 7 days' time consumed in transporting the equipment between Marion, Indiana, and Phoenix, Arizona, could not be considered a delay in shipment justifying the assessment of liquidated damages.

On March 18, 1942, findings of fact were issued by the contracting officer wherein it was concluded that the delivery of the equipment for transportation to the Universal Carloading and Distributing Company was not a "shipment" within the terms of the contract (citing 16 Comp. Gen. 918), and that actual shipment of the equipment was made from Phoenix, Arizona, on July 23, 1941, thereby entailing a delay of 38 calendar days, for which liquidated damages were assessable, in the absence of a reason excusable under the terms of the contract.

The contractor, by letter of June 3, 1942, protested this finding. It does not protest payment of liquidated damages for the 31-day delay prior to movement of the equipment from Marion, Indiana, but as to the additional 7-day deduction, it contends as follows:

We contracted to ship from Marion, Indiana, and there is no indication in this contract that shipment could not be made by the Universal Carloading Company, therefore, we contend that the liquidated damages should be figured on the basis of shipment from Marion, Indiana on July 16.

In support of his holding that shipment from Marion, Indiana, by the Universal Carloading and Distributing Company, did not constitute shipment within the terms of the contract, the contracting officer cites the opinion rendered by the Comptroller General in the case of the *Maremont Automotive Products, Inc.*, 16 Comp. Gen. 918.

In this connection reference is made to the Department's letter of December 24, 1941, addressed to the Comptroller General, requesting his opinion, in view of his decision in the *Maremont* case, on

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specific questions concerning whether shipment by carloading companies or similar forwarding agents constituted "shipment" within the terms of the Government's contract. These questions were prompted by an appeal, filed by the Grinnell Company of the Pacific, from the contracting officer's finding of fact on Bureau of Reclamation contract I2r-10563, which called for shipment of certain equipment from Elkhart, Indiana. The Henry Weiss Manufacturing Company, of Elkhart (the subcontractor of the Grinnell Company), delivered the equipment to the National Carloading Company at Elkhart within the time designated by the contract. The equipment went as part of a carload lot from Elkhart to Los Angeles, California, where it was delivered to the Santa Fe Railway Company for transportation to its final destination. The contracting officer's findings, and an Administrative Finding (M. 30864), rendered by the Department on June 24, 1941, determined that shipment was made as of the date of delivery to the railway company at Los Angeles, which was later than the shipment date designated, and imposed liquidated damages accordingly. The Comptroller General, in an opinion dated February 17, 1942, 21 Comp. Gen. 776, decided in that case that his office would allow the contractor's claim for remission of the liquidated damages which had been deducted for the time consumed in shipment by the National Carloading Company between Elkhart, Indiana, and Los Angeles, California. The decision reads in part as follows:

In the instant [Grinnell] case, the administrative determination that the 16 shower cabinets were not shipped until October 5, 1939, the date on which they were delivered to the Atchison, Topeka & Santa Fe Railway Company in Los Angeles, California, for shipment to Earp, California, was based upon the assumption that under the cited decision of this office, 16 Comp. Gen. 918, delivery to the National Carloading Company did not constitute shipment within the meaning of the contract provisions fixing the contractor's liability for delay in shipment. * * *

The cited decision of this office did not hold that the National Carloading Company was not a common carrier. On the contrary, it was said in the decision that "under certain conditions, a forwarding agent is 'as to a person with whom he contracts for the delivery of the goods, a common carrier and liable as such', 10 Corpus Juris 50", but it was pointed out that in that case the forwarding agent, the National Carloading Company, was the contractor's agent for whose delays the contractor was responsible, and that mere delivery to such agent did not constitute shipment when there was a delay on the part of the agent in beginning the actual transportation of the goods.

* * * The term "shipment" has been defined as contemplating complete delivery of goods by the shipper to the carrier for transportation and it has been held that "shipment" is not made until the shipper has parted with all control over the goods and nothing remains to be done by him to complete delivery to the carrier. See *National Importing and Trading Co. v. E. A. Bear & Co.*, 155 N. E. 343, 346, 324 Ill. 346; also, see *Campbell River Mills Co. v.*

Chicago, M., St. P. & P. R. Co., 42 F. (2d) 775, 777; and *Arnold v. United States*, 115 F. (2d) 523, 527.

It is understood that forwarding agents generally utilize the services of common carriers, such as railroad and trucking companies, which are subject to the regulations of the Interstate Commerce Commission, and that all goods delivered to such agents are of necessity released to such carriers for transit to destination. Even though a consignment of goods may be shipped by a forwarding agent, as was the case in this instance, such shipment apparently presupposes that the goods were released to a carrier, either a railroad or trucking company, before shipment from the specified shipping point.

Therefore, it follows that, as a general rule in this and similar cases, the date of shipment for the purpose of fixing liability for liquidated damages, is the date on which the goods are actually released to the railroad or trucking company, either by the contractor or the forwarding agent, at the point specified in the contract for shipment.

In the instant case the evidence of record before this office indicates that Government bill of lading No. I-801318, dated September 11, 1939, with an all-rail routing from Elkhart, Indiana, to Earp, California, was furnished the contractor for use in making shipment of the cabinets. The said bill of lading was transmitted by the contractor to its supplier, the Henry Weiss Manufacturing Company, at Elkhart, Indiana, with an order for the cabinets, and shipment thereof was made by the National Carloading Corporation as a part of a carload lot moving to Los Angeles where the contents of the car appear to have been distributed, the cabinets being delivered to the Atchison, Topeka & Santa Fe Railway Company on October 5, 1939, for shipment to Earp, California, where they were received on October 7, 1939.

While no proof has been furnished as to the date on which the cabinets actually were released by the National Carloading Corporation to the carrier in Elkhart, Indiana, the evidence of record reasonably establishes that the shipment actually moved from the contractor's shipping point, Elkhart, Indiana, within the time specified in the contract for shipment. Accordingly, the claim for remission of the liquidated damages deducted from the contract price for the cabinets will be allowed in due course. [*Italics supplied.*]

In the instant case the evidence of record in the Department indicates that the contractor agreed to make delivery f. o. b. cars at Yuma, Arizona, and to make shipment from Marion, Indiana, within 45 calendar days after the date of receipt of notice of award of the contract. The award of the contract was made by Bureau of Reclamation letter dated April 30, 1941, which was received by the contractor on May 1, 1941, thus establishing the shipping date as June 15, 1941. The material was delivered by the Anaconda Wire & Cable Company (the subcontractor of The Mine and Smelter Supply Company), in Marion, Indiana, on July 16, 1941, to the Universal Carloading and Distributing Company, which consigned the equipment to itself. Upon its arrival at Phoenix, Arizona, on July 23, 1941, the equipment was shipped via Southern Pacific Railway Company, consigned to the Bureau of Reclamation at Yuma, Arizona. There occurred a delay of 31 days, therefore, between the

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contract date when shipment was to have commenced and the date when the equipment actually was shipped from Marion, Indiana. The contracting officer's assessment of liquidated damages for this delay of 31 days, at the rate of \$5 per day, has been accepted by the contractor without protest. The subject of this appeal is the additional amount of \$35 for liquidated damages for the 7 days' time consumed in shipment between Marion, Indiana, and Phoenix, Arizona, assessed by the contracting officer on the ground that under the decision in the *Maremont* case, *supra*, "delivery to a carloading company is not a shipment within the terms of the contract," and, accordingly, that "shipment" was not made until July 23, when the equipment was consigned to the Bureau of Reclamation.

While the detailed circumstances of the *Maremont* case were not recited in the decision, it would seem that the contracting officer's understanding of the holding in that case is refuted by the unequivocal statement of the Comptroller General in the *Grinnell* case to the effect that his cited decision in the *Maremont* case did not hold that the carloading company "was not a common carrier," but "On the contrary, it was said * * * that 'under certain conditions, a forwarding agent is "as to a person with whom he contracts for the delivery of the goods, a common carrier and liable as such", * * *.'" Despite the above-quoted language, no definite statement was made by the Comptroller General as to whether and in what circumstances he would consider that delivery to a carloading company or similar forwarding agent constitutes shipment. His decision in the *Grinnell* case, allowing remission of liquidated damages which were collected under the above-discussed interpretation of the decision in the *Maremont* case, appears to have been based on the fact that the evidence of record reasonably establishes that the equipment was actually released to the transportation company and that "the shipment actually moved from the contractor's shipping point * * * within the time specified in the contract for shipment."

On the basis of the evidence in the instant case, I find that all control over the shipment of the cable equipment was relinquished by the Anaconda Wire & Cable Company (subcontractor of The Mine and Smelter Supply Company) to the Universal Carloading and Distributing Company, for shipment from Marion, Indiana, on July 16, 1941, and that the shipment actually moved from the contractor's shipping point 31 days after the time specified in the contract for shipment therefrom. Accordingly, under the terms of the contract, the assessment of liquidated damages for 31 days' delay in shipment, at \$5 per day, was proper. The assessment of such

damages for the additional 7-day period was improper, in the circumstances, and should be remitted.

So Ordered.

APPLICABILITY OF THE HATCH POLITICAL ACTIVITY ACT TO OFFICE OF CIVILIAN DEFENSE EMPLOYEES IN HAWAII.

Opinion, October 12, 1942

FEDERAL EMPLOYEES—HAWAII—POLITICAL ACTIVITIES—HATCH POLITICAL ACTIVITY ACT—HOLDING ELECTIVE TERRITORIAL OFFICE.

Employees of the Office of Civilian Defense in the Territory of Hawaii, paid from funds allocated to the Secretary of the Interior from a special emergency appropriation made to the President, to provide for emergencies affecting the national security and defense (55 Stat. 92, 94), are employees of the executive branch of the Federal Government and accordingly are prohibited by section 9(a) of the Hatch Political Activity Act (act of August 2, 1939, 53 Stat. 1147, 18 U. S. C. sec. 61h), as amended, from taking any active part in political management or in political campaigns. Consequently, they may neither seek nor hold elective office in the Government of the Territory of Hawaii.

GRAHAM, Assistant Solicitor:

Reference is made to your [Director, Division of Territories and Island Possessions] memorandum of September 23 submitting for opinion an inquiry from the Governor of Hawaii regarding the application of the Hatch Act to certain personnel employed by the Office of Civilian Defense in Hawaii.

The Governor inquires whether personnel of the Office of Civilian Defense in Hawaii, who are paid out of the \$15,000,000 fund allocated under date of January 12, 1942, from the President's Emergency Fund to the Secretary of the Interior for the protection, care and relief of the civilian population in the Territory of Hawaii, may hold or seek elective office in the government of the Territory or a municipality thereof.

It is my opinion that such personnel may neither seek nor hold elective office in the government of the Territory of Hawaii or a municipality thereof.

The President by allocation letter dated January 12, 1942, advised the Secretary of the Interior as follows:

By virtue of the authority vested in me by the provisions of the appropriation entitled "Emergency Fund for the President" contained in the Independent Offices Appropriation Act, 1942, approved April 5, 1941 [55 Stat. 94], I hereby allocate from the sum of \$100,000,000 provided by said appropriation as follows:

<i>To</i>	<i>Amount</i>
The Secretary of the Interior	\$15,000,000

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to be expended by said Secretary, or such other person or persons as may be designated for the purpose, for any and all emergencies due to the existing war conditions for the protection, care, and relief of the civilian population in the Territory of Hawaii.

The funds hereby allocated shall be available for all necessary expenses in carrying out the above-described activities, including the procurement of supplies, services, and materials without regard to Section 3709 of the Revised Statutes; the advance of funds without regard to Section 3648 of the Revised Statutes; the employment of personnel without regard to the civil-service or classification laws; travel expenses outside the United States without regard to the Standardized Government Travel Regulations and the Subsistence Expense Act of 1926 as amended, and Section 901 of the Act of June 29, 1936 (49 Stat. 2015).

Please arrange for the necessary transfer of funds and advise the Secretary of the Interior accordingly.

On March 4, pursuant to the above authority, the Governor of Hawaii was advised by a telegram from the Secretary that he was authorized to obligate the funds thus made available.

A review of the circumstances surrounding the allocation of the funds under discussion discloses that they were derived from a special fund appropriated by the Congress and made available to the President for his use in emergency situations. These funds are in no sense to be regarded either as a loan or as a grant to the Territory of Hawaii. While the Governor of Hawaii disburses the money he does not act in his official capacity as Governor in so doing, but acts merely as the officially designated agent of the Secretary of the Interior for that special purpose. The funds therefore are not Territorial funds, but funds of the executive branch of the Federal Government under control of the Secretary of the Interior. Authority to employ personnel under the allocation letter likewise is delegated to the Governor of Hawaii, but, as in the case of the expenditure of funds, he acts as the officially designated agent of the Secretary of the Interior and not in his capacity as Governor of Hawaii. Persons employed under this authority receive formal appointments for an indefinite period, execute oaths of office upon entering on duty, and receive the benefits of the annual leave and retirement acts, in the same manner as other indefinite emergency appointees of the Federal Government. Moreover, it appears that the action of the Governor in making such local appointments is subject to later confirmation by the Secretary of the Interior. Therefore, even though the allocation letter provides that the employment of personnel may be made "without regard to the civil service or classification laws," it appears clear, from the nature of their employments, that persons employed thereunder are nevertheless Federal employees. And since they are paid from funds allocated to

the Secretary of the Interior from the "Emergency Fund for the President," it follows that they are employees of the executive branch of the Federal Government.

Section 9 of the Hatch Act (act of August 2, 1939, 53 Stat. 1147, 18 U. S. C. sec. 61h), as amended, provides:

Sec. 9. (a) It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.

(b) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person.

There appears no need of arguing that a person who holds or seeks elective office in the government of a territory or municipality is taking an "active part in political management or in political campaigns." Accordingly, such action on the part of the employees here under discussion clearly would violate the prohibition contained in the second sentence of section 9 (a) to the effect that "No officer or employee in the executive branch of the Federal Government, or any agency or department thereof * * * shall take any active part in political management or in political campaigns." While it might appear that this section is not applicable because of the fourth sentence of section 9 (a), which provides that "For the purposes of this section the term 'officer' or 'employee' shall not be construed to include * * * (2) persons whose compensation is paid from the appropriation for the office of the President;" an examination of the appropriation language establishes that the fund from which the President's allocation was made was not that appropriated for "the office of the President" but a special emergency fund "to enable the President, through appropriate agencies of the Government, to

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provide for emergencies affecting the national security and defense and for each and every purpose connected therewith, * * *." (55 Stat. 92, 94.)

Section 9 (b) provides that any person violating the provisions of section 9 (a) "shall be immediately removed from the position or office held by him * * *." Section 15 provides:

SEC. 15. The provisions of this Act which prohibit persons to whom such provisions apply from taking any active part in political management or in political campaigns shall be deemed to prohibit the same activities on the part of such persons as the United States Civil Service Commission has heretofore determined are at the time this section takes effect prohibited on the part of employees in the classified civil service of the United States by the provisions of the civil-service rules prohibiting such employees from taking any active part in political management or in political campaigns.

Pertinent rules of the United States Civil Service Commission on this point are contained in Civil Service Form 1236, titled "Political Activity and Political Assessments of Federal Officeholders and Employees" (1939), which provides under paragraph 34 in part as follows:

In view of the broad language of section 9 of the act of August 2, 1939 [Hatch Act]; the incumbency by a Federal employee of *any elective office whatever under a State, Territorial, or municipal government is prohibited*, regardless of whether or not the office is of such character that its incumbency was permitted by Executive order prior to the enactment of the act. [Italics supplied.]

The foregoing language establishes without doubt that a Federal employee of the executive branch of the Federal Government, or any agency or department thereof, who either seeks or holds any elective office whatever under a State, Territorial, or municipal government, must be immediately removed from the Federal position or office held by him.

Accordingly, it is my opinion that personnel of the Office of Civilian Defense in Hawaii whose salaries are paid out of the \$15,000,000 fund allocated on January 12, 1942, from the President's Emergency Fund to the Secretary of the Interior for the protection, care and relief of the civilian population in the Territory of Hawaii, may neither seek nor hold elective office in the Government of the Territory of Hawaii or a municipality thereof.

INHERITANCE RIGHTS OF LEGITIMATE AND ILLEGITIMATE INDIAN CHILDREN

Opinion, October 14, 1942

INDIANS—ILLEGITIMATE CHILDREN—DESCENT AND DISTRIBUTION—APPLICABILITY
OF STATE LAWS—STATUTORY CONSTRUCTION.

The act of February 28, 1891 (26 Stat. 794, 795, 25 U. S. C. sec. 371), did not confer on illegitimate Indian children such a status of legitimacy as would permit them to share in estates of their mothers' kindred by representing their deceased mothers.

Legitimate Indian children may represent their deceased father who was illegitimate, only if such father could have shared in the estates of his kindred.

An illegitimate Indian child may represent his deceased father in estates of his father's kindred by reason of section 5 of the act of February 28, 1891 (26 Stat. 794, 795, 25 U. S. C. sec. 371).

GARDNER, *Solicitor*:

You [Secretary of the Interior] have requested my opinion as to whether, by reason of section 5 of the act of February 28, 1891 (26 Stat. 794, 795, 25 U. S. C. sec. 371), certain persons may share in the estate of Milo Jacobs, deceased Colville Allottee No. S. 1923. The estate consists of a trust allotment in the State of Washington.

Milo Jacobs died in 1928, without issue. He was survived by a wife, a full brother, and 15 nephews and nieces. It is the right of the nephews and nieces to inherit which is here in question.

Milo Jacobs' mother was a Colville Indian who was married to a white man. From this marriage three children were born: Milo, the instant decedent; George, who was living at the date of Milo's death but who died in 1930, and Emma, who died in 1915, prior to the death of Milo, and who is survived by an illegitimate son, Isaac Thatcher, whose father is unknown. Milo Jacobs' mother also had an illegitimate son, by a white man. This son, Barney Rickard, died in 1924, before Milo's death, and left 14 legitimate issue.

Two questions are therefore presented for consideration:

1. Is Isaac Thatcher, the illegitimate nephew, entitled to inherit by representing his predeceased mother, a legitimate sister of the decedent, Milo Jacobs?

2. Are the 14 legitimate children of Barney Rickard, the predeceased illegitimate half brother of the decedent, Milo Jacobs, entitled to inherit by representing their father?

Milo Jacobs' heirs must be determined by you¹ in accordance with the laws of descent of the State of Washington, except as otherwise provided by section 5 of the General Allotment Act of February 8, 1887 (24 Stat. 388, 389, 25 U. S. C. sec. 348), as amended. The Washington law, so far as material, provides:

Every illegitimate child shall be considered as an heir to the person who shall in writing, signed in the presence of a competent witness, have acknowl-

¹ Act of Congress of June 25, 1910 (36 Stat. 855, 25 U. S. C. sec. 372). *Lane v. Mickadiet*, 241 U. S. 201 (1916); *Hallowell v. Commons*, 239 U. S. 506 (1916); *Dixon v. Cox*, 268 Fed. 285 (C. C. A. 8, 1920), app. dism. 258 U. S. 634 (1922).

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edged himself to be the father of such child, and shall in all cases be considered as heir of his mother, and shall inherit his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock; *but he shall not be allowed to claim, as representing his father or mother, any part of the estate of his or her kindred, either lineal or collateral, unless before his death his parents shall have intermarried, and his father, after such marriage, shall have acknowledged him as aforesaid, and adopted him into his family, in which case such child and the legitimate children shall be considered as brothers and sisters, and on the death of either of them intestate, and without issue, the others shall inherit his estate, and he theirs, as heretofore provided in like manner as if all the children had been legitimate, saving to the father and mother, respectively, their rights in the estates of all the said children, as provided heretofore in like manner as if all had been legitimate.*² [Italics supplied.]

There is nothing in the present record to indicate that Isaac Thatcher's parents ever intermarried or that the putative father ever acknowledged in writing that he was the father of Isaac. Since under such circumstances illegitimates are clearly barred by the above provision from representing their mothers in estates of their mothers' collateral kindred, Isaac Thatcher may not inherit any part of Milo Jacobs' estate unless Congress has provided that illegitimates may inherit trust property by representing their mothers notwithstanding the provisions of the applicable State law on the subject.

Section 5 of the General Allotment Act, *supra*, provides that the Secretary of the Interior—

* * * shall cause patents to issue therefor in the name of the allottees, which patents shall be of the legal effect, and declare that the United States does and will hold the land thus allotted, * * * in trust for the sole use and benefit of the Indian to whom such allotment shall have been made, or, in case of his decease, of his heirs according to the laws of the State or Territory where such land is located, * * *: *Provided*, That the law of descent and partition in force in the State or Territory where such lands are situate shall apply thereto after patents therefor have been executed and delivered, except as herein otherwise provided: * * *

The act of February 28, 1891, *supra*, amends the above section by adding the requirement:

That for the purpose of determining the descent of land to the heirs of any deceased Indian under the provisions of the fifth section of said act, whenever any male and female Indian shall have co-habited together as husband and wife according to the custom and manner of Indian life the issue of such co-habitation shall be, for the purpose aforesaid, taken and deemed to be the legitimate issue of the Indians so living together, and every Indian child, otherwise illegitimate, shall for such purpose be taken and deemed to be the legitimate issue of the father of such child: * * *

² Remington's Revised Statutes of Washington, vol. 3, sec. 1345.

The record before me does not show that Isaac Thatcher claims that his right to inherit in this estate of his mother's collateral kindred arises by reason of his parents having cohabited together as husband and wife according to the custom of Indian life. Therefore, if his claim is to be upheld it must be sustained by reason of the words, "every Indian child, otherwise illegitimate, shall for such purpose [of determining the descent of land] be taken and deemed to be the legitimate issue of the father of such child."

In my opinion these words cannot confer upon Isaac Thatcher a status of legitimacy which would permit him to represent his mother in this estate. These words make illegitimates the legitimate issue of their fathers for certain purposes connected with the descent of restricted Indian estates but there is nothing in the section to indicate that any modification of the State laws with respect to the rights of illegitimates to inherit from or through their mothers was intended by Congress.

It is well established that statutes must be construed in the light of the purpose which Congress was attempting to accomplish and of the evil which it was attempting to correct. *Waskey v. Hammer*, 223 U. S. 85 (1912); *Thompson v. Thompson*, 218 U. S. 611 (1910). When this particular amendment to the General Allotment Act was enacted a complete plan for the determination of the heirs of allottees had not been formulated by Congress. It was not until some 23 years after the passage of the General Allotment Act and 19 years after the passage of this amendment that the Secretary of the Interior was, by the act of June 25, 1910 (36 Stat. 855, 25 U. S. C. sec. 372), given the exclusive authority to determine the heirs of deceased allottees.

The act of 1887, *supra*, did not confer upon the States any authority to determine the status of persons claiming as heirs. Neither did it confer upon any tribunal, State or Federal, the authority to determine such heirs. Many State courts, however, assumed the function of determining heirs of deceased Indian allottees and this Department, when it found such determinations to be correct, often approved deeds passing title to property to heirs determined by the State courts. The State courts, in deciding the issue of who should be the heirs of another, no doubt applied their State standards of marriage and legitimation.

Under the common law an illegitimate child had no right to inherit either from his father or his mother and, of course, he could not represent either of them in order to take from their relatives. Any rights which illegitimates had in 1891 had been conferred upon them by the action of the various legislatures. A great many of the

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States at that time had conferred upon such children the right to inherit from their mothers and permitted them to inherit from their fathers if the fathers had conformed with the State statutes regarding legitimation. These statutes usually provided that an illegitimate child might inherit from his father if the parents had subsequently intermarried or if the father had acknowledged the child in the manner required by the particular statutes. Except in the case of subsequent intermarriage or acknowledgment by the fathers most of the Western States did not at that time permit illegitimate children to represent either of their parents in estates of their kindred, lineal or collateral.³

Thus the rights of Indian children to share in allotments could be defeated by the failure of the Indians to meet the marriage requirements of the State or by the failure of the natural fathers to meet the technical requirements of the State statutes regarding legitimation. It was evidently for the purpose of correcting this situation that the above provision—section 5 of the act of 1891, *supra*—was incorporated in an act which had for its primary purpose a change in the existing allotment law governing the amount of land which each individual Indian should receive.

By this section, Congress removed all doubt as to the inheritable capacity of children born of Indian custom marriages. Careful analysis of the second provision of the section, dealing with the inheritable capacity of children not legitimated by the first provision, leads me to believe that Congress intended to relieve such children from the applicability of the State law so far as inheritance from and through their fathers was concerned but that it intended to leave their status so far as inheritance from and through their mothers was concerned unchanged.

Clearly some distinction must have been contemplated between the first and second provisions of the section. Had Congress intended to legitimize such children for all purposes connected with the descent of land, it is reasonable to assume that it would have done so in one provision. It would not have conferred a status of legitimacy on certain of these children in one provision and on all others in the next. It is evident that Congress was not only legislating for a different class in the second part of the section but that a different provision for that class was contemplated. Any other

³ Colorado, Mills' Annotated Statutes 1891; Dakota Territory, Compiled Laws, 1887, sec. 3403; Idaho, Revised Statutes 1887; Michigan, Howell's Annotated Statutes, 1882, sec. 5773a; Minnesota, General Statutes of Minnesota, vol. 1, 1878, vol. 2, Supplement to 1888, ch. XLVI sec. 2; Montana, Compiled Statutes, 1887, sec. 536; Nevada, Compiled Laws 1891, sec. 1125; Oklahoma Territory, Session Laws, 1890, sec. 5; Washington, Hill's Annotated Statutes and Codes, 1891, sec. 1484; Wisconsin Annotated Statutes 1889.

construction of the second provision of the section would make the first provision thereof meaningless.

This construction of the provision now under consideration is borne out by the legislative history of the section. Section 5 of the 1891 act was introduced in the Senate in the exact language as the section now appears in the statute. As reported by the Senate Committee on Indian Affairs, no change was made in the second provision although the words "whenever any male and female Indian shall have cohabited together" were stricken and the words "whenever any man and woman either of whom is in whole or in part of Indian Blood shall have cohabited together" were inserted. The bill passed the Senate as amended by the Committee.⁴ When the bill was reported by the House Committee on Indian Affairs, that Committee substituted the words of a pending House bill on the same subject. As reported by the House Committee, the bill provided that every illegitimate Indian child should be taken and deemed to be the legitimate issue of the *parents* of such child.⁵ The bill passed the House as reported by the Committee.⁶ The Senate refused to concur in the House amendment,⁷ and the bill went to conference. The conferees recommended that both Houses accept the section as originally introduced in the Senate and both Houses accepted this recommendation.⁸

It is significant to note that language which would have eliminated all doubt as to the capacity of illegitimate children to inherit from and through both of their parents was before the Congress and it deliberately chose language making the child the lawful issue of the father only. It must be assumed that Congress intended to leave the question of inheritance by such children from and through their mothers for determination in accordance with the provisions of the various State laws.

Shortly after the Department was given exclusive jurisdiction to determine the heirs of deceased Indians, a former Solicitor considered section 5 in an opinion dated September 15, 1914. After reviewing the general situation existing at the time of the passage of the act of 1891, the Solicitor said: "Evidently the purpose of the act of 1891 was to provide a general rule more nearly fitted to the mode of life of the Indians to govern in this matter." In considering the clause "and every Indian child, otherwise illegitimate, shall for

⁴ 21 Cong. Rec., p. 3723 (1890).

⁵ H. Rept. 1809, 51st Cong., 1st sess. (1890).

⁶ 21 Cong. Rec., p. 10705 (1890).

⁷ *Id.*, p. 10710.

⁸ 22 Cong. Rec. 3118, 3152 (1891).

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such purpose be taken and deemed to be the legitimate issue of the father of such child," the Solicitor said:

This is broad enough to include the children of Indians who have not cohabited together as husband and wife and there is nothing to indicate that the plain purport of the words was not intended. I am of opinion, therefore, that it must be construed to include Indian children who would be illegitimate even under Indian laws and customs. * * * The provision in question, therefore, makes these children legitimate for all purposes connected with the descent of land. In my opinion the father may inherit from such child, the legitimate issue of either parent may likewise inherit from such child, and the child may inherit by representing either of its parents.

In a memorandum dated February 2, 1915, the Solicitor reconsidered his former opinion and adhered to the views expressed therein. For a period of four years this interpretation of the provision was followed by the Department and illegitimates were permitted to inherit by representing both their mothers and fathers. See cases of *John Hillis* (51697-12) and *Raphael Pajanim* (125732-15).

In 1919, the provision was reexamined in the case of *May Caramony* (D. 43035). May Caramony was an illegitimate child and the question presented was whether her father should be permitted to inherit from her. In refusing to permit the father to share in her estate, the Department said:

* * * Under the existing construction placed on section 5, no distinction is made between children coming under either the first or the additional clause. In other words no distinction is recognized so far as resultant benefits are concerned between the children of a valid Indian custom marriage and children born of illicit relations. The effect is to recognize as legitimate for "all purposes" the offspring even of adulterous relations.

The Department questioned whether such consequences could have been intended by Congress in the enactment of the second provision of the section and pointed out that prior to the Solicitor's opinions above referred to a directly opposite view of the provision had been taken by the Department. After pointing out that so broad a construction as that given to the section by the former Solicitor's opinions permitted an adulterous father to inherit from his unacknowledged child, that it made unnecessary the first part of the statutory provision legitimatizing children born of Indian custom marriages, and that Congress could not have intended to depart so widely from general State law in this regard, the decision concludes:

In view of the foregoing considerations the construction placed upon the second clause of section 5 of the act of February 23, 1891, in Solicitor's opinions of September 15, 1914 and February 2, 1915, will no longer be followed. Hereafter the class of children contemplated by said clause will be regarded as legitimate only for the purpose of inheriting from the father * * *.

In my opinion this decision is a correct interpretation of the law. The act did not confer a status of legitimacy on these children for all purposes. It did no more than to make them the legitimate issue of their fathers for the purpose of determining the descent of trust lands. The *Caramony* decision, which specifically overruled the former Solicitor's opinions on the provision has been followed by the Department for almost a quarter of a century and the Department has refused to permit illegitimate children to inherit by representing their mothers unless such inheritance is permitted under the law of the State where the trust property is situated.⁹ This long-continued administrative construction of the statute should not be disturbed even were the question more doubtful than it appears to me.

Therefore since Isaac Thatcher, an illegitimate, may not inherit by representing his mother under the laws of the State of Washington and since his rights in this respect were not changed by the act of 1891, *supra*, my answer to the first question is that he may not share in the estate of Milo Jacobs.

The second question is whether the 14 legitimate children of Barney Rickard, the predeceased illegitimate half brother of Milo Jacobs, may share in Milo Jacobs' estate by representing their father. The laws of Washington provide with respect to inheritance by representation:

Inheritance or succession by right of representation takes place when the descendants of any deceased heir take the same share or right in the estate of another that their parent would have taken if living.¹⁰

Before these 14 children may represent their father in this estate it must be shown that the father himself, Barney Rickard, could have inherited in this estate had he outlived the instant decedent. Barney Rickard was an illegitimate child whose relationship to the decedent was through his mother. As I have pointed out in my answer to the first question, Barney Rickard could not under the State law inherit from his mother's kindred, collateral or lineal. Neither are his rights of inheritance from his mother's kindred enlarged by the act of 1891. Therefore, since Barney Rickard himself could not have inherited from Milo Jacobs, it must be held that his 14 legitimate issue may not represent him in this estate.

In its submission of the above questions for an opinion the Office of Indian Affairs asks also that one other phase of the question of

⁹ Mike Weeks (1904-36); Albina Smith Lanigreen (72557-38); Eunice Lose (10582-37); Frank Moore (6445-37); Joseph Too-Too (41446-34); Esther McKenzie Poor (7302-29); Zelo Big Tail (13627-38); Margaret Baker Necklace (34408-35); Lydia O. St. Pierre (4655-29).

¹⁰ Remington's Revised Statutes of Washington, vol. 3, sec. 1355.

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the rights of illegitimates to inherit restricted estates be clarified. It states that the *Caramony* decision has been considered authority for holding that an illegitimate child could not inherit by representing either of its parents. I believe that no departmental decision accepts this view. The *Caramony* decision is not authority for holding that an illegitimate child may not inherit by representing his father. On the contrary, in that very case, an illegitimate was permitted to inherit by representing his father, who was barred from participating in the estate.

By the 1891 amendment to section 5 of the General Allotment Act, Congress declared illegitimate children to be the legitimate issue of their fathers. From this declaration it would seem that all of the rights of inheritance that go with being the legitimate issue of such fathers were thereby conferred upon the children. Congress did not limit this right of inheritance by declaring that they should be permitted to inherit only from the fathers. Statutes legitimatizing children should be liberally construed. *In re Shipp's Estate*, 144 Pac. 143 (Calif. 1914). It must, therefore, be assumed that Congress realized that by declaring such children to be the legitimate issue of their fathers it was doing more than declaring that they might be permitted to inherit from their natural fathers. The legislation must also be read with the settled rule that when a person has been made the lawful issue of another he obtains an inheritable status and he may receive and transmit property from that other's collateral and lineal kindred in the same manner as those born in lawful wedlock. *In re Sheffer's Will*, 249 N. Y. Supp. 102 (1931); *Blythe v. Ayres*, 31 Pac. 915 (Calif. 1892); *McKamie v. Baskerville et al.*, 7 S. W. 194 (Tenn. 1888); *Pratt v. Pratt*, 5 Mo. App. 539 (1878).

There is only one sentence in the *Caramony* decision which might be construed as precluding inheritance by representation of the father. I refer to the sentence: "Hereafter the class of children contemplated by said clause will be regarded as legitimate only for the purpose of inheriting from the father." A study of the decision leads me to believe that these words were used to distinguish between the rights of the child and the rights of the father so far as inheritance was concerned and that the words were not intended to limit the rights of a child to inheritance directly from the father.

I have found only one departmental determination made since the *Caramony* decision—the case of *Anderson White* (13570-35)—in which the question of the right of an illegitimate to represent his father was involved. In that case the child was barred from participation in the estate by reason of a provision of a State law. No

reference was made to the effect of the 1891 act on such a situation. In my opinion that decision is wrong.

I conclude, therefore, that illegitimate children should be permitted to inherit by representing their fathers because they were made the legitimate issue of their fathers by section 5 of the 1891 act, *supra*.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

WITHDRAWAL OF RESTRICTED FIVE TRIBES FUNDS

Opinion, October 20, 1942

AUTHORITY OF SUPERINTENDENT FOR FIVE CIVILIZED TRIBES—AUTHORITY OF SECRETARY—CLAIMS AGAINST RESTRICTED FUNDS—WITHDRAWAL OF RESTRICTED FUNDS.

Section 18 of the act of February 14, 1920 (41 Stat. 408, 426), which vests in the Superintendent for the Five Civilized Tribes of Oklahoma certain responsibilities respecting the disposition of restricted Indian moneys, is not superseded by section 1 of the act of January 27, 1933 (47 Stat. 777), which relates to the responsibilities of the Secretary of the Interior with respect to such moneys. The earlier statute, while still in force, must be limited in application to the payment of "undisputed claims," and it has no bearing upon the removal of restrictions at the request of the Indians concerned.

GARDNER, *Solicitor*:

My opinion has been requested on the question of whether section 18 of the act of February 14, 1920 (41 Stat. 408, 426), which vests in the Superintendent for the Five Civilized Tribes of Oklahoma certain responsibilities respecting the disposition of restricted Indian moneys, is superseded by section 1 of the act of January 27, 1933 (47 Stat. 777), which relates to the responsibilities of the Secretary of the Interior with respect to such moneys.

Section 18 of the act of 1920 provides:

* * * That hereafter no undisputed claims to be paid from individual moneys of restricted allottees * * * or uncontested * * * leases * * * made by individual restricted Indian allottees * * * shall be forwarded to the Secretary of the Interior for approval, but all such undisputed claims or uncontested leases * * * shall hereafter be paid, approved, rejected, or disapproved by the Superintendent for the Five Civilized Tribes of Oklahoma: *Provided, however,* That any party aggrieved by any decision or order of the Superintendent for the Five Civilized Tribes of Oklahoma may appeal from the same to the Secretary of the Interior within thirty days from the date of said decision or order.

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The pertinent section of the 1933 act provides:

That all funds and other securities now held by or which may hereafter come under the supervision of the Secretary of the Interior * * * shall remain subject to * * * expenditure * * * for the use and benefit of the individual Indians to whom such funds and securities belong, under such rules and regulations as said Secretary may prescribe: * * *.

The question now raised relates entirely to the distribution of responsibilities between the Secretary of the Interior and the Superintendent of the Five Civilized Tribes. Specifically the question is whether the necessity for a particular statutory procedure for the payment of "undisputed claims," which is required by the act of 1920, has been eliminated by reason of the general language contained in the 1933 act. I am satisfied that the 1933 act was not intended to alter the procedural requirements of the 1920 statute and that the language of the 1933 act cannot reasonably be construed to effect a repeal by implication of the 1920 statutory requirements. The 1933 act specifies that certain funds shall *remain* subject to expenditure under regulations prescribed by the Secretary. It does not say that the Secretary may prescribe regulations without regard to prior statutes on the subject. On the contrary, the use of the term "remain" in the 1933 statute indicates that a continuation, rather than an expansion, of the Secretary's power as established prior to 1933 is intended. (See 54 I. D. 382.)

Prior to 1933, the Secretary exercised general supervision over the handling of individual restricted funds subject to various statutory limitations. One of these limitations was that contained in the 1920 act. The purpose of the provision in that act prescribing a particular procedure with respect to "undisputed claims" was to eliminate duplication and waste, avoid unnecessary delay and curtail the cost of administrative expenditures in handling all of the undisputed claims. (Cong. Rec., 66th Cong., 2d sess., pp. 1278-80; 65th Cong., 3d sess., pp. 2005-09; 65th Cong., 2d sess., pp. 6623-36, 6676-85.) There was no incompatibility between the Secretary's general supervision of the subject and the observance of this procedure prior to 1933, and there is none today. Supervision which takes the form of review on appeal is as legitimate a form of supervision as any other. A statutory prescription of this particular form must be viewed as parallel to many other statutory restrictions upon the subject matter which the Secretary of the Interior was compelled to observe prior to 1933 and which he is still compelled to observe. Upon the wisdom of this statutory restriction I offer no comment. Clearly it reflects a dissatisfaction on the part of

Congress with delays incidental to the referring of routine business to Washington. Congress has not indicated any change from the attitude on this subject which it took in 1920.

Since, therefore, there is no incompatibility between the two statutory provisions, I must hold that the requirement of the 1920 statute is not repealed by the 1933 act.

To this conclusion I must add the observation that while the procedural requirements of the 1920 statute have not been extinguished by anything contained in the 1933 act, the scope of the 1920 statutory requirement has, in my opinion, been misunderstood by the Superintendent of the Five Civilized Tribes. Correspondence from that official expressed the view that the 1920 statute vests in the Superintendent a broad authority with respect to the withdrawal of Indian moneys by Indians themselves. This view is apparently based upon an overruled Solicitor's opinion (D. 44083, February 7, 1919). The decision rendered in 1919 by Solicitor Mahaffie was reversed on November 4, 1921, in an opinion rendered by Solicitor Booth (M. 6397). The latter opinion held:

A request or demand by the Indian himself for any part or all of his funds is not such a "claim" as would bring the matter within the statute.

I am entirely persuaded that the latter opinion, which has governed the Department for 21 years, is correct. It follows that the question of how far the Superintendent for the Five Civilized Tribes shall be given responsibility to pass on applications by Indians for the release of restricted funds is one to be determined in the discretion of the Secretary of the Interior. The limitations upon discretion which the 1920 act imposes in the case of "undisputed claims" have no application to the lifting of restrictions upon Indian funds.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

OWNERSHIP OF MINERALS BENEATH LAND GRANT ACT RIGHT-OF-WAY NORTHERN PACIFIC RAILROAD COMPANY

Opinion, October 29, 1942

ESTATE IN RIGHT-OF-WAY—LIMITATION OF USE TO RAILROAD PURPOSES—EXTRACTION OF UNDERLYING MINERALS—IMMATERIALITY OF NONINTERFERENCE WITH RAILROAD USES.

The right-of-way granted to the Northern Pacific Railroad Company by section 2 of the act of July 2, 1864 (13 Stat. 365), is a limited fee upon an implied condition of reverter. Section 3 of that act which conveyed an

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absolute fee in the odd-numbered sections which it granted does not apply to the segments of the right-of-way over odd-numbered sections. The right-of-way grant is for railroad purposes only. It conveyed no interest in the underlying minerals since their extraction is not essential for such purposes. Nor is it material that a proposed use for other than railroad purposes will not interfere with the continued operation of the railroad.

GARDNER, *Solicitor*:

My opinion has been requested as to whether the Northern Pacific Railway Company may dredge for gold on its right-of-way just east of Missoula, Montana, granted to its predecessor, the Northern Pacific Railroad Company, by the act of July 2, 1864 (13 Stat. 365). The general counsel for the company has inquired whether the Government will concede that the railroad has this right, in view of the decision of the Supreme Court in *Great Northern Ry. Co. v. United States*, 315 U. S. 262 (1942). He takes the position that dredging the right-of-way for gold would not constitute a diversion of it from railroad purposes. He also states that the company's engineers have told him that the dredging incidentally will develop rock and gravel which would be useful for the roadbed.

Section 2 of the act of July 2, 1864 (13 Stat. 365, 367), is as follows:

That the right of way through the public lands be, and the same is hereby, granted to said "Northern Pacific Railroad Company," its successors and assigns, for the construction of a railroad and telegraph as proposed; and the right, power, and authority is hereby given to said corporation to take from the public lands, adjacent to the line of said road, material of earth, stone, timber, and so forth, for the construction thereof. Said way is granted to said railroad to the extent of two hundred feet in width on each side of said railroad where it may pass through the public domain, including all necessary ground for station buildings, workshops, depots, machine shops, switches, side tracks, turn-tables, and water-stations; * * *

The right-of-way grant made by this statute has invariably been denominated a limited fee upon an implied condition of reverter. *Northern Pacific Ry. v. Townsend*, 190 U. S. 267, 271 (1903); *E. A. Crandall*, 43 L. D. 556, 557 (1915); *Melder v. White*, 28 L. D. 412, 418 (1899); see *Great Northern Ry. Co. v. United States*, 315 U. S. 262, 273, fn. 6, 276 (1942). Moreover, even though the right-of-way crosses odd-numbered sections of land, this does not make the railroad's title, as to such segments of the right-of-way, one acquired in fee simple absolute under section 3 of the act. *H. A. & L. D. Holland Co. v. Northern Pac. Ry. Co.*, 214 Fed. 920, 924-925 (C. C. A. 9, 1914); *People v. Tulare Packing Co.*, 25 Calif. App. (2d) 717, 78 P. (2d) 763 (1938).

The characterization of the grant as an estate in the nature of a limited fee does not determine the respective rights of the Government and the railroad since the grant of such an estate includes varying rights, depending on the purpose for which it is made and the restrictions embodied in it. 56 I. D. 206, 208 (1937). The purpose for which the grant to the Northern Pacific was made is succinctly stated in *Northern Pac. Ry. v. Townsend*, 190 U. S. 267 (1903). The court in that case, at page 271, said:

The substantial consideration inducing the grant was the perpetual use of the land for the legitimate purposes of the railroad, just as though the land had been conveyed in terms to have and to hold the same so long as it was used for the railroad right-of-way. In effect the grant was of a limited fee, made on an implied condition of reverter in the event that the company ceased to use or retain the land for the purpose for which it was granted.

Therefore, the extent of the railroad's rights under this grant is no greater than is necessary for railroad use. *Barden v. Northern Pacific Railroad*, 154 U. S. 288, 319, 325 (1894); *H. A. & L. D. Holland Co. v. Northern Pac. Ry. Co.*, 214 Fed. 920, 926 (C. C. A. 9, 1914); *Instructions of July 23, 1918*, 46 L. D. 429, 431; *cf. Great Northern Ry. v. Steinke*, 261 U. S. 119, 124 (1923). Only that which is conveyed in clear and explicit language passes to the railroad grantee and all inferences are resolved not against but for the Government. *Great Northern Ry. Co. v. United States*, 315 U. S. 262, 272 (1942); *Caldwell v. United States*, 250 U. S. 14, 20 (1919). From the foregoing, it is obvious that for a grant of a limited fee of the right-of-way for a railroad to be effective, it need convey only the right to use the land exclusively for railroad purposes. Since the extraction of minerals from the railroad's right-of-way is not essential to its use for railway purposes, such minerals never passed to the Northern Pacific Railroad Company, or its successor. *cf. Great Northern Ry. Co. v. United States*, 315 U. S. 262, 272 (1942). This well-established rule is thus summarized in 1 Lindley on Mines (3d ed. 1914), sec. 153, page 281:

Grants of this character carry with them the implied condition that the lands are not to be used except for the purposes of legitimate railroad operation. No title is acquired to underlying mines, and the land cannot be mined for its oil, gas or other mineral deposits.

This Department has followed this rule with respect to other railroad grants. *Use of Railroad Right-of-Way for Extracting Oil*, 56 I. D. 206 (1937); *Abilene Oil Company v. Choctaw, Oklahoma and Gulf Railroad Company*, 54 I. D. 392, 398 (1934); *Missouri, Kansas and Texas Ry. Co.*, 33 L. D. 470 (1905); see *State of Wyoming*,

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September 18, 1942, *supra*, p. 128; A. Otis Birch, 53 I. D. 340, 344 (1931).

It thus appears that the right-of-way which the Northern Pacific Railroad acquired under the act of 1864, even though it may be a limited fee, can be used only for the purposes designated in the grant. 56 I. D. 206, 208 (1937). Moreover, the Northern Pacific right-of-way cannot be used for other and foreign uses since it is clear that Congress intended that the right-of-way should be held and used exclusively for railroad purposes. *H. A. & L. D. Holland Co. v. Northern Pac. Ry. Co.*, 214 Fed. 920, 926 (C. C. A. 9, 1914); see *Northern Pac. R. Co. v. City of Spokane*, 64 Fed. 506, 508 (C. C. A. 9, 1894). In the former case, the court said at page 926:

It must be borne in mind that the grant from the Government was not for public purposes generally, but for a single designated public purpose, and an unnecessary diversion to a foreign use constitutes a violation of the conditions of the grant, in cases as well where such use is public as where it is private.

Nor can the proposed dredging of the right-of-way for gold be justified on the ground that it may "incidentally develop rock and gravel, which would be useful for the roadbed." It is the right-of-way and not its products which are to be used for railroad purposes. 56 I. D. 206, 211 (1937). Furthermore, it is immaterial that the proposed use may not interfere with the continued operation of the railroad, since it must be presumed that the entire right-of-way is essential for railroad purposes. *Northern Pac. Ry. v. Townsend*, 190 U. S. 267, 272 (1903); *Northern Pacific Railroad Co. v. Smith*, 171 U. S. 260, 275 (1898). It must be concluded, therefore, that the grant of the right-of-way, although it may be said to be a limited fee, is confined in its use to railroad purposes only. *Cf. Clear Water Short Line Ry. Co.*, 29 L. D. 569 (1900); *Santa Fe Pacific R.R. Co.*, 27 L. D. 649 (1898).

The proposition that the grant of a limited fee in the right-of-way includes not only the use of the surface for railroad purposes but the minerals underneath it as well is clearly untenable. It is negatived by the provisions of section 3 of the Northern Pacific Act as well as by the Joint Resolution of January 30, 1865 (13 Stat. 567). The grant of lands in aid of the construction of the railroad made by section 3 did not include mineral lands. The Joint Resolution, passed at the second session of the Thirty-Eighth Congress, provided that no act, passed at the first session, granting land to aid in the construction of roads should be construed to embrace mineral lands which were to be reserved exclusively to the United States unless otherwise spe-

cially provided in the granting acts. In the face of this expressed purpose it cannot be said that the grant of the right-of-way could have been intended to include more than the mere surface rights.

Moreover, this Department has construed the right-of-way grant to the Northern Pacific as not including any minerals it may contain, and has interpreted rights-of-way made by other land grant acts in the light of the Northern Pacific grant. In *Missouri, Kansas and Texas Ry. Co.*, 33 L. D. 470 (1905), the Assistant Attorney General pointed out, pages 471-2, that the right-of-way grant made to that railroad by the act of July 26, 1866 (14 Stat. 289), was similar to the right-of-way grant made to the Northern Pacific by the act of July 2, 1864, and that "the fee granted the company for its right-of-way is subject to the conditions expressed in the act and also to those necessarily implied, namely, that it should be used for the purposes designated—that is, for the purpose of maintaining the railroad * * *." He, therefore, held that the railroad could not make an oil and gas lease covering its right-of-way and terminal grounds. The same construction of the Northern Pacific grant is to be found in *State of Wyoming*, September 18, 1942, *supra*, p. 128, in which Assistant Secretary Chapman approved the holding of the Commissioner of the General Land Office that the grant of the right-of-way to the Union Pacific Railroad Company, like that to the Northern Pacific, is a limited fee on an implied condition of reverter, the basis of that opinion being that the minerals within the right-of-way did not belong to the railroad.

Nor does the opinion in *Great Northern Ry. Co. v. United States*, 315 U. S. 262 (1942), suggest that the railroad has any right to extract minerals from its right-of-way. There, that railroad urged that it was entitled to extract oil from its right-of-way acquired under the Right-of-Way Act of 1875 (18 Stat. 482, 43 U. S. C. sec. 934), because that statute granted a limited fee. The Supreme Court, in denying the railroad's right to extract oil from the right-of-way, held it to be an easement and not a limited fee. It is to be noted that the grant to the Great Northern is substantially the same as that to the Northern Pacific. But it is unnecessary to determine whether the railroad could, in any event, claim more than an easement, for the court in the *Great Northern* case neither held nor implied that if the grant had been held to be a limited fee the underlying minerals would have belonged to the railroad. Its statement, that when Congress made a land grant to a railroad "there is little reason to suppose that it intended to give only an easement in the right-of-way granted in the same act" does not mean that the right-of-way also included the minerals, since the court pointed out that none of the cases relied upon by the railroad

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as holding that land grant acts conferred limited fees involved rights to minerals under a right-of-way. *Great Northern Ry. Co. v. United States, supra*, at page 278. When the Great Northern Railway Company requested this Department to rule as to whether it could extract oil from its right-of-way, it was held that the Great Northern, although its right-of-way might be a limited or base fee, had no right to extract the underlying oil. 56 I. D. 206 (1937). That conclusion is clearly applicable to the present grant.

Approved:

ABE FORTAS,

Under Secretary.

AUTHORITY OF SECRETARY OF THE INTERIOR TO REQUIRE ASSIGNMENT OF RIGHTS TO INVENTIONS MADE BY EMPLOYEES TO UNITED STATES

Opinion, October 30, 1942.

FEDERAL EMPLOYEES—EMPLOYMENT—PATENTS—AUTHORITY OF HEAD OF DEPARTMENT TO REQUIRE ASSIGNMENT TO UNITED STATES.

Authority for promulgation of a departmental order requiring that each employee of the Department, as a condition of his employment, assign to the United States all rights to any inventions made by him in the course of his governmental activities is contained in section 161 of the Revised Statutes (5 U. S. C. sec. 22), if such an order is "not inconsistent with law." There is no statutory provision or court decision declaring such an order invalid.

GARDNER, *Solicitor*:

You [Secretary of the Interior] have requested my opinion as to your legal power to promulgate a proposed departmental order to improve the procedures now used in patent matters. A copy of the proposed order, circulated for comment by your memorandum of October 14, is attached. A number of drafting changes should be made before promulgation of the order, but these do not affect the basic question.*

The proposed order provides, in brief, that each employee of the Department, as a condition of his employment, must assign to the United States, represented by the Secretary of the Interior, all rights "to any invention made by the employee within the general scope of his governmental duties." These duties are defined to include (1) any invention arising in the course of an assigned research or investiga-

* Promulgated, with minor modifications, on November 17, 1942, as Secretary's Order No. 1763. [Editor.]

tion project which is relevant to the general field of the assigned inquiry, and (2) any invention made through the use of Government facilities, financing, time, or confidential information. A report of employee inventions is required to be made to the Secretary, through the Bureau head and the Solicitor, for determination of the relative rights of the Government and the employee under the order.

Section 161 of the Revised Statutes (5 U. S. C. sec. 22) provides:

The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it.

The proposed order deals with the "government" of the Department, and "the conduct of its officers and clerks." It fixes the manner of the "performance" of the Department's scientific and research "business." It prevents private advantage being taken of a privileged "use" of the Department "records." Finally, it not only secures to the Government the exclusive benefit of the use of the Department's scientific property but makes certain that its intangible rights of property in Government inventions shall be preserved. I think, therefore, that Section 161 is plain authority for the proposed procedures, so long only as they be "not inconsistent with law." The inquiry, then, becomes whether there is any statutory provision which would prevent the operation of the proposed order.

The constitutional and statutory framework of the general patent system does not prevent any employer, whether private or governmental, from requiring by prior contract the assignment of any patent rights which the employee may obtain on inventions made during the time of his employment. R. S. section 4898 (35 U. S. C. sec. 47). Indeed, this is a customary incident of private employment. Any statutory bar must, therefore, relate to the specific problems of Government employment. I have found only two statutes that are relevant.

The act of March 3, 1883, as amended (35 U. S. C. sec. 45), authorizes the grant of a patent to Government employees without the payment of any fee if the head of the department certifies that the invention will be useful in the public interest and if the employee states that the invention may be used or manufactured by or for the United States without the payment of a royalty. The act undoubtedly contemplates that the Government employee *may* obtain a patent in his own name and offers a costless procedure in return for

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the assurance of shop rights.¹ It does not forbid assignment of the whole patent right by the employee, and it does not forbid the Government or the employee, in a particular case or in all cases, from agreeing in advance that the patent right shall be assigned.²

The act of June 25, 1910 (36 Stat. 851, 35 U. S. C. sec. 68), authorizes suit in the Court of Claims for patent infringement by the Government and excepts patentees who, when they made the claim, were in the Government service, or their assignees.³ This act also recognizes the possibility of patent rights being held by Government employees on work developed in the Government service, but, as in the case of the act of 1883, does not forbid their assignment to the Government. It seeks only to insure the minimum, shop rights, to the Government in the case of patents held by its employees.

I find, then, no statutory bar to promulgation of the proposed patent procedures. The chief legal difficulty which has been suggested is, however, not the statutes but the gloss which has been cast over past governmental practice by court decisions.

Prior to 1932, the cases marked out three general propositions. If the employee was not assigned to experiment in the field of his discovery, he was entitled to a patent right good even against the Government. *United States v. Burns*, 12 Wall. 246, 252; *Solomons v. United States*, 137 U. S. 342, 346; cf. *James v. Campbell*, 104 U. S. 356, 357-360; *United States v. Palmer*, 128 U. S. 262, 270-271. But if the invention was accomplished on Government time and with Government facilities, the Government had shop rights even though the employee had the patent rights generally. *McAleer v. United States*, 150 U. S. 424, 432; *Solomons v. United States*, *supra*, 346; *Gill v. United States*, 160 U. S. 426. And, if the employee was specifically assigned to experiment in the field of his discovery, he was required to assign all patent rights to the Government. *Solomons v.*

¹ Congress considered, when it made a clarifying amendment in 1928, that the provision served an important purpose in encouraging employees to take out patents, with shop rights reserved to the Government, and thus avoiding suits for Government infringement when others patented a variation upon the employee's invention. See H. Rept. 871, S. Rept. 765, 70th Cong., 1st sess.; 69 Cong. Rec. 5013, 7066. But there was no indication that Congress intended that the Government should not obtain greater rights than ordinarily given it.

² Thus, notwithstanding the act of 1883, it has never been questioned but that an employee assigned to invent a specific improvement cannot claim personal patent rights in the resulting invention. See *United States v. Dubilier Condenser Corp.*, 289 U. S. 173, 187, and cases cited.

³ The exception of the Government employee was added as a floor amendment in the House, 45 Cong. Rec. 8785. It reflected the strong sentiment of the membership that the Government employee should in no case be able to levy upon the Government for the use of an invention made possible by the Government. 45 Cong. Rec. 8757, 8780, 8768, 8772, 8780-8782, 8785. There is nothing to suggest that the Congress would have viewed the further protection of a complete assignment of the patent rights as undesirable.

United States, supra, 346; *Gill v. United States, supra*, 432; see *Standard Parts Co. v. Peck*, 264 U. S. 52. These three lines of cases, each recognizing the authority of the other, seem to have fixed the general notion of what the "law" required as to the patent rights of Government employees. But it is to be noted that each arose in the absence of a contract of employment or of a departmental regulation which would control the patent rights.

The whole subject was reexamined in *United States v. Dubilier Condenser Corp.*, 289 U. S. 178, 193. Two employees of the Bureau of Standards were assigned to research in the field of "airplane radio." There were no departmental or bureau regulations or agreements as to the disposition of patent rights. After considerable work, undertaken with Government facilities, on Government time, and with knowledge of their superiors, they produced an invention which made possible the use of alternating current on household radios. The Court held, with Justices Stone and Cardozo and Chief Justice Hughes dissenting, that the work was outside the assigned duties of the employees and that the Government was therefore entitled only to shop rights. The decision, therefore, apart from a dubious interpretation of the facts, simply reaffirmed the settled rule. But the opinion covers a wide range and has sometimes been taken as indicating the invalidity of administrative regulations such as those now proposed.

I am clear that the *Dubilier* case does not go so far. (a) The case concerned only inventions made in the absence of a contract or regulation. The Court specifically noted that one Department had attempted by regulation to require assignment to the Government⁴ and expressly stated that it was unnecessary to consider the validity of this exercise of departmental power (289 U. S. at 208). (b) The opinion is based upon principles of contract: without a contract controlling the patent rights, one must look to the assignment of duties to determine whether the employer or employee by the contract of employment was intended to have the resulting patents. (289 U. S. at 187, 188, 190, 192, 193, 194, 195, 196.) The proposed regulations, making the assignment a condition of employment, would become a part of the contract of employment. *Williams v. Terminal Co.*, 315 U. S. 386, 398. Accordingly, the basis of the *Dubilier* decision would be absent and that holding irrelevant. Indeed, the Court twice took pains in the *Dubilier* case to note that the employees had in no way been put on notice of the Government's claims. (289 U. S. at 185, 193-194.)

⁴The Department of Agriculture, in 1907. The regulations were sustained in *Seiden Co. v. National Aniline & Chemical Co.*, 48 F. (2d) 270 (W. D. N. Y., 1930).

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There are, at two places in the *Dubilier* opinion, dicta that the formulation of such a patent policy is matter for Congress. The first instance merely stated that the question was one for Congress, not the courts, and may be dismissed (289 U. S. at 198). The second, however, expressly stated that neither the courts nor the administrative officers could in the silence of Congress alter the rights of the employees to patents (289 U. S. at 208-209). But the statement was either in response to the Government's argument that official determination *after* either the invention or the issuance of the patent⁵ would be sufficient to oust the employees of their rights (289 U. S. at 208) or was completely unprovoked dictum. It is, then, either irrelevant to the validity of the proposed regulations or unimportant.

I am confirmed in this opinion by two assumptions. It is hardly likely that the Supreme Court would, without argument and in a case which did not present the issue, cavalierly curtail executive power without consideration of the basic Section 161 of the Revised Statutes. In the second place, such a conclusion would be a reversal of *McAleer v. United States*, 150 U. S. 424. There the Court relied, for the main ground of decision, upon a license (for one dollar and other valuable consideration) to the Government to use the invention. The license was given *after* the invention and the decision would apply *a fortiori* to an undertaking entered into before the invention. It is not to be supposed, again, that the Court would intend to reverse itself by a rhetorical clause at the end of an opinion in a case which did not present the question.

I conclude, therefore, that section 161 of the Revised Statutes authorizes the Secretary of the Interior to prescribe the proposed patent procedures "for the government of his department" and "the conduct of its officers and clerks" and to aid in the "performance of its business, and the custody, use, and preservation of the records, papers, and property appertaining to it." No statute qualifies the broad authority given by this section, and the judicial decisions are concerned only with the relative rights of the Government and its employees to inventions made without any prior arrangement such as that contemplated by the proposed departmental order.

Approved:

HAROLD L. ICKES,

Secretary of the Interior.

⁵ The Government's brief did not present any argument based upon administrative determination, except to note that after the applications had been filed the Bureau officials asserted a claim to the invention (p. 12). The respondent's brief complained that this assertion was a reversal of their previous encouragement to take out a patent (p. 25). Nos. 316-318, Oct. Term, 1932.

STATUS OF PUBLIC LANDS DRAINED AND ASSESSED BY ARKANSAS DRAINAGE DISTRICTS UNDER THE CARAWAY ACT OF JANUARY 17, 1920

Opinion, October 30, 1942

STATE DRAINAGE OF UNITED STATES LANDS—CARAWAY ACT OF JANUARY 17, 1920—LIMITATIONS ON RIGHTS ACCORDED THE STATE—NO FORFEITURE OF TITLE FOR NONPAYMENT OF DRAINAGE LIENS—CARAWAY SYSTEM OF ENTRY AND PATENT FOR SATISFACTION OF DELINQUENT DRAINAGE CHARGES—RIGHT TO CARAWAY ENTRY AND PATENT ARISING FROM DRAINAGE LIENS A STATUTORY BAR TO WITHDRAWAL FROM SUCH ENTRY BUT NOT TO WITHDRAWAL FROM HOMESTEAD ENTRY OR OTHER FORMS OF DISPOSITION UNDER THE PUBLIC LAND LAWS—SMITH IRRIGATION ACT OF AUGUST 11, 1916—ITS LIEN SECURITY SYSTEM DIFFERENT—RIGHT OF IRRIGATION DISTRICTS TO CONTINUANCE OF HOMESTEAD ENTRY—ERRONEOUS CARAWAY INSTRUCTIONS OVERRULED.

The Caraway Act of January 17, 1920, in support of the State's agricultural and tax economy permits certain entered and unentered public lands in Arkansas to be drained and assessed under Arkansas drainage laws but disclaims any United States obligation for such charges. It does not guarantee payment thereof but provides a system for acquisition of United States patent to lien-burdened lands whereby drainage charges may be satisfied by third parties if they fulfill the statutory conditions.

Held, 1. That the Caraway Act confers on the State only the rights prescribed by its terms and that it adopts no State law incompatible therewith. 2. That the terms of the act contemplate transfer of United States title to these lands by no means other than issuance of United States patent and that they confer no power upon the State to divest the United States of its title by forfeiture for nonpayment of drainage charges or in any other manner whatever. 3. That the act creates in the drainage districts and in qualified claimants thereunder a right to Caraway entry and patent. 4. That a prior statutory right to Caraway entry and patent cannot be defeated by an Executive order of withdrawal even if such order omit to declare that its operation is subject to existing valid rights; but the right to Caraway entry and patent does not bar withdrawal of lands assessed for drainage charges from homestead entry or other forms of disposition under the public land laws. 5. That the lien security system under the Smith Irrigation Act of August 11, 1916, differs from the Caraway system in making a homestead entryman indispensable to satisfaction of an irrigation district's lien and that instructions concerning the Caraway Act are in error in regarding the systems as similar and the Caraway system, like the Smith, as barring both withdrawal from homestead entry and classification under Taylor Grazing Act.

ARKANSAS LAND POLICY ACT OF MARCH 16, 1939—STATE LAND COMMISSIONER—JURISDICTION—NO RELEASE OF CARAWAY LIENS—TAYLOR GRAZING ACT APPLICABLE.

Upon the assumption that without waiver of the drainage liens the Caraway lands, although rendered unfit for occupancy through natural causes, could not be withdrawn from homestead entry and made subject to classification as to suitability therefor under section 7 of the Taylor Grazing Act, question was raised whether under the Arkansas Land Policy Act, No.

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331, of March 16, 1939, the State Land Commissioner had authority to waive or cancel the Caraway liens. *Held*, 1. That the act probably relates only to State-owned lands and does not apply to the delinquent United States lands, which cannot become State-owned through forfeiture for delinquent charges. 2. That in the absence of any State construction of the Land Policy Act as to such authority to waive or cancel the liens, the Caraway lands cannot be regarded as falling under the jurisdiction of the State Land Commissioner for the purpose of taking such action. 3. That the liens continue unimpaired, subject to enforcement as prescribed by the Caraway Act.

GARDNER, *Solicitor*:

At the instance of the Commissioner of the General Land Office you [Secretary of the Interior] have inquired my opinion as to whether Act 331 of the Acts of Arkansas of 1939, approved on March 16, 1939, can be construed as granting adequate authority to the State Land Commissioner to release drainage tax liens levied against public lands under the act of January 17, 1920, so that these lands would come under the withdrawal order of February 5, 1935, and thus become subject to classification under section 7 of the Taylor Grazing Act.

Underlying this question is the assumption that without a waiver of such liens these lands would not be subject to the withdrawal order of February 5, 1935, and to classification under section 7 of the Taylor Act. I am of opinion that this assumption is erroneous in point of law and therefore that the question presented cannot receive a yes-or-no answer. Instead, then, of answering this question as originally put by the Commissioner, I shall consider the question whether such waiver of liens is possible and then turn to a consideration of the effects of waiver or non-waiver upon Federal withdrawal and classification.

These lands the act of January 17, 1920 (41 Stat. 392, 43 U. S. C. secs. 1041-1048), sometimes called the Caraway Act, declares to be subject to the laws of the State of Arkansas relating to the organization, government and regulation of drainage districts to the same extent and in the same manner, except as otherwise provided, as lands held under private ownership. The purpose of this adoption of Arkansas law was twofold, first, to authorize the Arkansas drainage districts comprising the public lands specified to reclaim them for agricultural use and, second, to provide a system of assessment and tax sales for delinquent drainage charges whereby the districts, without recourse to the Federal Government, might recover from third parties the costs of drainage operations on Government lands.

Under the terms of the Caraway Act, the drainage district might impose liens upon unentered as well as upon entered public lands

and might sell such lands at tax sales to satisfy the liens. Purchasers at such sales, however, would receive no title to the land but only a right to acquire patent from the United States upon payment of five dollars per acre and compliance with various other statutory conditions.

This Caraway Act of 1920 is couched in language practically identical with that of the Volstead Act of May 20, 1908 (35 Stat. 169), amended by the act of September 5, 1916 (39 Stat. 722), affecting public and Indian ceded lands in the State of Minnesota. It has the same purpose and the problems which it presents are similar to those created by the Volstead Act concerning public lands. The Minnesota difficulties were discussed in a Solicitor's opinion of August 12, 1942, 58 I. D. 65, *supra*.

The public lands specified in the Caraway Act are all those unentered, unreserved lands and all those entered lands for which no final certificates have been issued situate in seven townships in Mississippi and Poinsett counties.¹ Of the public lands remaining vacant in these townships, General Land Office records in 1940 showed that assessments had been levied on about 2,413 acres and that most of the liens for these charges had long continued delinquent.

Concerning the possible release of these liens by the State, the Commissioner's inquiry is to be considered against the following background: The townships described lie in the Big Lake and St. Francis River area of northeastern Arkansas, which in 1811 and 1812 was affected by the "New Madrid earthquake."² Lowered in elevation by the series of convulsions, the whole area has since been known as the Sunken Lands. After 1893 the construction of the St. Francis levee along the west bank of the Mississippi afforded such protection to these lands as to permit their reclamation by a system of drainage canals built by local drainage districts organized under the general drainage law of the State or by special act. In 1920 the Caraway Act was passed in order that the public lands here situate, then undrained and unfit for cultivation, might be included in drainage districts and by bearing their share of the drainage costs profit by the district improvements. It was expected that when drained these lands would be of high value for agricultural use.³

¹ These townships are Ts. 14, 15 and 16 N., R. 9 E., 5th P. M.; Ts. 15 and 16 N., R. 10 E., 5th P. M.; and Ts. 11 and 12 N., R. 6 E., 5th P. M.

² Report 1527, May 5, 1928, House Committee on Public Lands, on H. R. 10657, 70th Cong., 1st sess., Secretary's File No. 2 129, G.L.O., Arkansas Sunk Lands, Legislation 70th Congress, 1st sess.

³ Report 1009, Jan. 29, 1919, House Committee on Public Lands, on H. R. 11715, 65th Cong., 3d sess., Secretary's File 2 129, G.L.O., Arkansas Sunk Lands, Legislation, 65th Congress.

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This hope fell far short of realization. The great Mississippi flood of 1927 seriously injured the St. Francis levees and the works of the drainage districts in Mississippi and Poinsett counties.⁴ The lands became subject to periodic overflows and for months at a time were under water. Moreover there developed a strong probability that new plans for flood control of the St. Francis River basin would either leave the lands in question entirely unprotected⁵ or require them for floodways or rights-of-way.⁶ These conditions far from putting an end to homesteading actually encouraged it. Many persons are said to have applied for entry for the sole purpose of later obtaining damages from the drainage districts for anticipated floodings of their entries.⁷

In consideration of all these facts both the General Land Office and the drainage districts concluded in 1934 that the public lands in question should be withdrawn from homestead entry until there should appear some reasonable assurance of their effective reclamation. At the same time the Bureau of Biological Survey⁸ requested the temporary withdrawal of these lands for classification as to their suitability for wildlife refuge purposes, desiring to add those found suitable to Big Lake Reservation, a large wildlife unit which the Bureau was administering on the western border of Drainage District No. 17.⁹ On June 29, 1934, the Executive Order requested was issued, No. 6761, and for some time thereafter the General Land Office rejected applications for homestead entry of these lands on the ground of their withdrawal for the purpose above described.¹⁰

However, on January 10, 1936, by letter M. 28257, the Department instructed the General Land Office as follows:

Where a lien has been created in favor of a drainage district upon lands described in the act of January 17, 1920, a subsequent withdrawal of any such lands will not defeat the right to enforce such lien by sale.

⁴ Footnote 2, *supra*.

⁵ 1543932, letter, April 13, 1934, Auditor of Drainage District No. 17 to General Land Office.

⁶ 1544852, letter, April 21, 1934, Acting Chief of Engineers, War Department, to Commissioner of General Land Office.

⁷ File "Big Lake National Wildlife Refuge, Ark., Pt. II," G.L.O. Land Classification Division, Lane: File memorandum, June 4, 1934, quoting Federal Receiver of Drainage District No. 17.

⁸ This Bureau, then in the Department of Agriculture, is now a part of the "Fish and Wildlife Service" in the Department of the Interior. See Reorganization Plan II, May 9, 1939 (53 Stat. 1431, 1433); and Plan III, April 2, 1940 (54 Stat. 1231, 1232).

⁹ Letter, May 18, 1934, Chief Darling to Secretary of Interior; letter, June 21, 1934, Secretary of Interior to Secretary of Agriculture. For file see fn. 7, *supra*.

¹⁰ For examples of such rejections see G.L.O. 05215, Daisy Coffey, Dec. 28, 1934, and G.L.O. 05217, George Billips, Dec. 27, 1934; Sept. 19, 1935.

This description of the superior right existing in the district as a "right to enforce such lien by sale" was correct as far as it went. But the instructions omitted to point out a certain other important part of the district's right. That is the right to see United States patent issue to tax sale purchasers in accordance with the terms not of the homestead law but of the Caraway Act, which is *sui generis* and provides for a system of entry entirely different from and independent of that of homestead entry.

In the absence of specifications on this point, the General Land Office construed the district's right as above defined to be synonymous with a right to the continuance of homestead entry. It therefore resumed allowance of applications for homestead entry of such of the lands as had been sold for drainage charges or assessed therefor. Necessarily, it applied the ruling to the withdrawal order of February 5, 1935, No. 6964, as well as to that of June 29, 1934, No. 6761.

Subsequent departmental instructions¹¹ implicitly sanctioned this practice. Moreover, they ruled specifically that the lands, being unaffected by withdrawal No. 6964 of February 5, 1935, were therefore not subject to section 7 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976). On the assumption that the Caraway Act was similar to the Smith Irrigation Act of August 11, 1916 (39 Stat. 506, 43 U. S. C. secs. 621-630), the instructions of November 16, 1937, accepted as applicable to the drainage districts the reasoning in the Arizona irrigation case of *Harley R. Black*, 55 I. D. 445 (Jan. 30, 1936). This held that homestead entry was indispensable to satisfaction of an irrigation district's rights under the Smith Act and hence that lien-burdened lands must not be withdrawn from homestead entry. But the instructions overlooked a fundamental difference between the two statutes. Unlike the Smith Irrigation Act, the Caraway Act did not make homestead entry a condition precedent to the satisfaction of a drainage district's rights but provided for its security system to function upon unentered lands through a Caraway entryman instead of a homestead entryman. Hence the rights of a drainage district have no connection with homestead entry and the reasoning of the *Black* case is inapplicable to them.

¹¹ The instructions of Nov. 16, 1937, answered the G.L.O. request of Oct. 1, 1937 (1690586), concerning the Caraway Act and withdrawal order No. 6761 of June 29, 1934, enlarging the wildlife refuge in which the Bureau of Biological Survey was interested. Those of Nov. 8, 1939, answered the G.L.O. request of Oct. 24, 1939 (1791365) concerning the relation to the drained lands under both the Volstead and the Caraway Acts of the Government's new land policy as reflected in the Taylor Grazing Act as amended and the general withdrawal orders.

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However, in pursuance of the several instructions given, the General Land Office has continued to rule that the lien-burdened lands must remain open to homestead entry and may not be withdrawn therefrom. In this posture of the matter the Commissioner of the General Land Office has made the instant inquiry. The theory of his question is (1) that the liens as valid rights existing in the State prevent the Executive order of February 5, 1935, from withdrawing these lands from homestead and other forms of entry under the public land laws; (2) that if the State were to release its liens, the order would attach to the lands and withdraw them from homestead entry; (3) that the lands would then be subject to classification under the Taylor Grazing Act; (4) that if found unsuitable for an agricultural classification, the lands could be withheld from homestead entry; and (5) that since in most cases an agricultural classification would be improper, applications for homestead entry would be subject to a control not now thought to exist. The Commissioner is therefore interested to know whether under the Arkansas Act of March 16, 1939, the Arkansas Commissioner of State Lands either has authority to release the liens in question or in consequence of any of his acts may be held to have waived them.

The act cited establishes a State land policy for Arkansas and confers on the Commissioner of State Lands the powers necessary to effectuate it. The act would appear to deal only with State-owned lands and to limit to such lands the Commissioner's powers under it. State-owned lands¹² include lands acquired by grant, purchase or gift; those sold or forfeited to the State for unpaid taxes; and islands formed in navigable waters subsequently to the State's admission to the Union. Hence unless the lien-burdened lands here in question fall within one of these categories of State-owned lands it would appear to me that the State Commissioner can have no jurisdiction or control over them either to release the liens on them or to retain them.

I think it is clear that the delinquent lands are public lands of the United States and that disposal of them is the prerogative of the Congress alone. Only the Congress may declare whether and how the United States shall be divested of its title to them and the Congress has nowhere provided that the United States may lose its title to its lands in Arkansas by operation of the State's law concerning taxation or drainage or any other subject. Indeed, the Congress has shown affirmatively by several provisions of the Caraway Act that it contemplates no transfer of the Government's title to the drained

¹² Pope's Digest of the Statutes of Arkansas, v. 2, ch. 99, Lands of the State, secs. 8601-8771.

lands in any manner save by United States patent. (See secs. 5, 6 and 7, 43 U. S. C. 1045, 1046, and 1047.)

Admittedly, the Caraway Act is a reference statute. By its first section it adopts the appropriate State laws for the organization and regulation of drainage districts together with their machinery for the levying and the collection of drainage assessments and for judicial sales to enforce unsatisfied liens.¹³ But in accordance with recognized principles it adopts only such portions of Arkansas law as may be appropriate and as may give force and effect to its own provisions. It adopts nothing that will be incompatible therewith.¹⁴ The act makes clear that transfer of title to these lands is to be by United States patent and it explicitly defines when, how and to what persons¹⁵ purchasing the lands for delinquent assessments such patent shall issue. It therefore does not adopt the incompatible provisions of Arkansas drainage district laws for issuance of tax title and tax deeds to these lands by the Chancery Court Commissioner in the Arkansas county concerned.

Moreover, the act contains in section 3 an unambiguous declaration that nothing in the act shall be construed as creating any obligation on the United States to pay any of the drainage charges. Since thereunder the Government is in no sense a debtor for the drainage liens, it would be absurd as well as inconsistent with the declaration to construe the Caraway Act as adopting an Arkansas forfeiture provision the effect of which would be to divest the Government of its title for nonpayment of a nonexistent debt.

¹³ See Act 103 of the Acts of Arkansas of 1917, approved February 20, 1917, organizing Drainage District No. 17 in Mississippi County and Act 193, approved March 9, 1917, organizing Drainage District No. 7 in Poinsett County. See also Pope's Digest of the Statutes of Arkansas, v. 1, ch. 52, Drains and Levees, secs. 4455-4536.

¹⁴ *Gillesby v. Board of Commissioners of Canyon County*, 107 Pac. 71, 74 (Idaho 1910); 1 Lewis' *Sutherland Statutory Construction* (2d ed.) sec. 6; 2 *idem.*, sec. 405; *State v. Board of Commissioners of Marion County*, 85 N. E. 513, 521 (Ind. 1908); *State v. Board of Commissioners of Shawnee County*, 110 Pac. 92, 94 (Kan. 1910); *State v. Tausick*, 116 Pac. 651, 657 (Wash. 1911); *Gadd v. McGuire*, 231 Pac. 754, 763 (Calif. 1924).

¹⁵ Sec. 5 of the Caraway Act expressly provided that no patent should issue to a drainage district or to anyone bidding in lands for it. But sec. 4 of the Driver Act of February 28, 1929 (45 Stat. 1410), removed this restriction and authorized execution of patents to districts in circumstances prescribed.

This Driver Act, which through some inadvertence does not appear in the U. S. Code, was enacted primarily not to amend the Caraway Act in any particular but to give United States consent to drainage assessments on public lands within the St. Francis Levee District other than those mentioned in the Caraway Act and thereby to relieve drainage districts which had been or might be adversely affected by the Supreme Court decision in *Lee v. Osceola and Little River Road Improvement District No. 1 of Mississippi County, Arkansas*, 268 U. S. 643. At the suggestion of the Department its section 4 was revised to apply only to the lands described in the Caraway Act and is therefore in effect an amendment thereof. See fn. 2, *supra*; also House debate, Jan. 16 and 24, 1929, Cong. Rec., v. 70, pt. 2, pp. 1795-1799, 2198-2200.

Sections 1, 2 and 3 of the Driver Act are administered by Division "C" of the G.L.O. and section 4 by Division "K". See G.L.O. Circ. No. 1190, June 5/9, 1929.

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Accordingly, since no congressional authorization of forfeiture of United States lands is to be read into the Caraway Act, it follows that the delinquent public lands here in question cannot fall under the jurisdiction of the State Commissioner as lands owned by the State through forfeiture for taxes nor yet under that of the drainage districts through forfeiture to them for assessments for drainage benefits. It follows also that the Arkansas liens continue unimpaired and subject to enforcement but only in accordance with the terms of the Caraway Act.

This conclusion is reached in the absence of any judicial or administrative determination by the State authorities of Arkansas concerning the State Land Policy Act. Conceivably the State authorities might give a very broad construction to the language contained in section 6 of that act authorizing the State Land Commissioner to "waive rights and priorities, in such manner and under such conditions as may be required by * * * agencies of the United States * * * in order to effectuate the policies declared in Section 1 of this Act," and on the basis of such a broad construction might hold that the State Land Commissioner had authority to waive liens not only on lands that are State-owned, in the strict sense, but also on lands in which agencies of the State such as drainage districts have only the type of interest conferred by the Caraway Act. Nothing in the present opinion is to be construed as denying the right of Arkansas authorities to place such a construction upon their own statute. But in the absence of any such administrative or judicial construction I conclude that lands which are owned by the Federal Government and not by the State of Arkansas do not fall within the jurisdiction of the Arkansas Land Commissioner for the purpose of effecting the cancelation of the liens here in question. Certainly in the absence of any State decision to the contrary I am constrained to answer in the negative the first part of the question presented by the General Land Office.

I hasten to add that regardless of any possible diversity of interpretation of the Arkansas statute it is clear that until issuance of United States patent in accordance with the terms of the Caraway Act or with those of other applicable public land laws the title to these lands remains in the United States and no act of the Arkansas legislature can operate to divest the Government of it.

There being no forfeiture, there is no occasion to discuss the ramifications of the authority over forfeited lands which the Land Policy Act of 1939 gives to the Commissioner of State Lands or of that which the drainage district acts give to the drainage districts embracing

the lands here involved.¹⁶ Nor is it necessary to consider what relation lands forfeited to these drainage districts for drainage benefits¹⁷ may bear to lands forfeited to the State for State taxes or whether the drainage district lands are in any way affected by the Land Policy Act of 1939.

In view of these negative answers to the Commissioner's question, the basic problem of the relation of the Caraway Act to homestead entry remains, with all the difficulties for the General Land Office that result from the belief that the lien-burdened lands must be kept open to homestead entry. However, in the course of the examination just made I have inquired further into this question, as has been indicated above, and I have been led to the conclusion that this belief is based upon fallacious assumptions.

The rights of the Arkansas drainage districts under the Caraway Act are similar to those conferred on the State of Minnesota by the Volstead Act of May 20, 1908, and analyzed in the Solicitor's opinion of August 12, 1942, *supra*, p. 65. Accordingly, the principles and the reasoning set forth in that opinion concerning the Minnesota drained lands are applicable to the Arkansas lands under the Caraway Act. As in Minnesota, therefore, the rights of the Arkansas drainage district and its lien purchaser under the Caraway Act are not rights to homestead entry. They are rights only to that form of disposition provided in the Caraway Act and they will therefore except the lands to which they are asserted from withdrawal from Caraway disposition and from that alone. They will not bar withdrawal of the lands from homestead entry and other forms of disposition under the public land laws.

In summary, therefore, I am of opinion—

1. That the Arkansas State Land Policy Act, No. 331 of March 16, 1939, probably relates only to State-owned lands and has no application to the lands of the United States described in the Caraway Act of January 17, 1920, for they cannot be forfeited for unpaid drainage charges and do not become State-owned lands.

2. That the only form of disposition of public lands to which rights are acquired by the Arkansas drainage districts concerned and their tax sale purchasers under the act of January 17, 1920, is the particular form of disposition prescribed in the act, herein referred to as Caraway purchase, cash entry or patent.

¹⁶ Footnote 13, *supra*.

¹⁷ Assessments for drainage improvements are not State taxes. The special acts creating these drainage districts provide for forfeiture not to the State but to the drainage districts of lands bid off for the districts upon the failure of tax sale purchasers and remaining unredeemed. The special acts also declare the drainage districts to be corporate bodies with all the powers and privileges of Arkansas corporations. These powers include the right to take, hold and convey lands. See acts cited in fn. 13, *supra*.

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3. That the valid rights to Caraway cash entry which the act creates in the drainage districts concerned and in those qualified persons claiming under them will upon assertion prevent withdrawal of lien-burdened lands from such entry, and, being statutory, cannot be defeated by an Executive order of withdrawal which omits to declare that its operation is subject to existing valid rights.

4. That nothing in the Caraway Act prevents unentered public lands which lie in the townships specified and which have been sold for drainage charges or merely assessed therefor from being withdrawn from homestead entry by an Executive order issued subsequently to the creation of the liens.

5. That of the Executive orders of June 29 and December 3, 1934, and of February 5, 1935, Nos. 6761, 6912 and 6964, respectively, each withdraws from homestead entry such of the lands specified in the Caraway Act as may be described by such order and as may not be included within any previous withdrawal; but none of them withdraws from Caraway disposition any of said lands to which Caraway rights shall be asserted.

6. That section 7 of the Taylor Grazing Act as amended is applicable to such of the Caraway lands as are withdrawn from homestead entry by the general withdrawal order of February 5, 1935, No. 6964, and makes their classification a condition precedent to their restoration to homestead or any other form of entry except Caraway entry.

7. That departmental instructions of January 10, 1936, November 16, 1937, and November 8, 1939, should be considered overruled in so far as they may be said to be inconsistent herewith.

Approved:

ABE FORTAS,

Under Secretary.

INCLUSION IN EXPLORATION AGREEMENTS OF OPTION TO GOVERNMENT FOR PRODUCTION OF MINERALS DISCOVERED

Opinion, October 31, 1942

EXPLORATION AGREEMENTS—BUREAU OF MINES—STRATEGIC MINERALS—OPTION TO GOVERNMENT FOR PRODUCTION OF MINERALS DISCOVERED.

In order to assure the production of strategic minerals discovered by it, the Bureau of Mines may, in executing agreements for mineral explorations on privately owned lands, include as a condition an option in favor of the United States which will allow an authorized agency of the Government to undertake further development and production of the minerals discovered.

GARDNER, *Solicitor*:

My opinion has been requested by the Bureau of Mines with regard to the insertion in a form agreement for mineral explorations on privately owned property of a provision which would require the owner of the land to enter into a commitment either to develop further and operate the property for the production of minerals that may be discovered, or to give the Government the right to do so. The suggestion is made that if legal authority for such a provision cannot be found, congressional action should be sought to make it possible. This proposal is set forth in a letter dated August 14, 1942, from E. D. Gardner, Regional Engineer, to the Assistant Director of the Bureau of Mines, a copy of which is annexed,* and was submitted to this office pursuant to the memorandum to you from the Director dated September 10 and referred to me on September 12 for my opinion.

The existing form of exploration agreement, a copy of which is attached to the Director's memorandum, merely grants to the Government the right to enter and make explorations. The Government does not commit itself to exercise the right. If the Government does make explorations and discovers ores or minerals in such form and quantity as to indicate that there should be further development and future production for war purposes, there is nothing in the existing form which offers any assurance that the work will be carried on by the owner of the land or that it will result in any immediate beneficial results. Inasmuch as explorations for strategic minerals are undertaken to locate minerals necessary for the prosecution of the war, the thought back of the proposal is that a means should be found to assure that production will result as quickly as possible from such discoveries as may be made.

The Bureau of Mines itself is not authorized to enter upon the production of minerals, strategic or otherwise, on a commercial scale. The statutory provisions of the Strategic Materials Act and the Interior Department Appropriation Act, under which the Bureau explores for strategic minerals, do not in terms make any provision for production if commercial ore bodies are discovered.** The Bureau is, however, given broad authority to make exploration agreements. Since its facilities are inadequate for the exploration of all potential deposits, it may choose between potential deposits on the basis of the likelihood of resulting development and production. Such

* Attachments referred to in this opinion may be found in the files of the Solicitor's Office.

** Strategic Materials Act of June 7, 1939 (53 Stat. 812; 50 U. S. C. sec. 98(f)); Interior Department Appropriation Act, 1943 (56 Stat. 506).

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action would accord with public policy as expressed in section 1 of the Strategic Materials Act, and in other recent statutes and Executive orders. Therefore, I have no doubt that whenever the Bureau considers it important to secure assurances as to the ultimate production of the minerals on the land it intends to explore, it may negotiate for an exploration agreement with the owner under which he will carry out or permit the carrying out of a program for any necessary further development and ultimate production.

A simple commitment by the owner to continue operations might be sufficient in some cases to insure ultimate production from worthwhile discoveries. This might be true where the owner is an established concern, qualified financially and otherwise to carry out a suitable program of operations. In any case, however, where the Bureau is not satisfied with the qualifications or the ability of the owner to proceed, something more would have to be required.

One way to accomplish the purpose would be to secure from the owner in advance as part of the exploration agreement an option to permit the acquisition by the Government of mineral interests for development and production purposes. The exercise of this option would be permitted by any department or agency that may be authorized to do so, in the event that the Bureau makes discoveries that warrant further operations.

An option such as is suggested above is complicated by two facts. (1) In order to be enforceable the terms and provisions of the undertaking if the option is exercised must be set forth as a part of the option, and (2) the property to be explored will often be under a lease and the interests and rights of both the lessor and lessee must be taken into consideration. A proposed form for exploration and option agreement has been prepared by this office and is attached hereto, entitled "Agreement for Mineral Explorations and Option for Production." The agreement as drafted is designed to give the Government the broadest possible powers for further development and future operations, as the option is for a mineral lease under which the Government could arrange for such operations as it sees fit. However, under the agreement the Government may refrain from exercising its option or may release the owner from any undertaking resulting from the exercise thereof, if the owner enters into an agreement for carrying out such program of development and production as the Government may consider to be necessary, by means of either private or Government financing. If the land is under lease, both the owner and the lessee will have to sign the exploration and option agreement. Rental for the mineral lease will be in the form of royalty payments on the production, the exact amount and terms of

which will have to be set forth in the agreement. The respective interests of the owner and the lessee, if the land is under lease, can be arranged for by prorating the royalty payments between them, or by separate agreement between them if that is necessary. The option and any mineral lease resulting therefrom are expressly made for the benefit of, and will be enforceable by, any department or agency of the Government which the Secretary of the Interior may later designate.

The effectiveness of such an exploration agreement will, of course, depend upon securing the cooperation of some department or agency of the Government which has the power and is willing to take up the option and enter into the lease. The most likely agency at present is the Defense Plant Corporation, and it is expressly but not exclusively named in the agreement. When the time comes to exercise an option it may be that legislation will have been enacted authorizing some other department or agency to act. However, it would be useful at this time to submit the proposed form of exploration and option agreement to the Defense Plant Corporation for its advice as to its probable interest in the exercise of such options and for its concurrence in the provisions thereof.

The proposed exploration agreement, with the option provision added, is more than a mere license to enter and explore, and therefore my memorandum of September 22, 1942 (M. 31926), with regard to the lack of necessity for recording exploration agreements of the sort heretofore used, has no application. This agreement form, if used, should be recorded upon the execution thereof, to preserve and protect the interests of the United States under it.

Moreover, in order to make certain that the owner cannot revoke the agreement prior to the completion of the exploratory work on the ground that the Government has furnished no consideration in exchange for his commitments, I suggest that the Government assume such binding undertaking with respect to the exploratory work as may be practical. I understand that officers of the Bureau of Mines concerned with this work recommend a provision whereby the Government agrees that if it commences exploratory work it will expend not less than a designated sum in such work. Such a provision would accomplish the purpose, and I have inserted it in the agreement.

In brief, my opinion is as follows:

In order to assure the production of strategic minerals discovered by it, the Bureau of Mines may, in executing agreements for mineral exploration on privately owned lands, include as a condition an option in favor of the United States which will allow an authorized agency

of the Government to undertake further development and production of the minerals discovered.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

D. SID SMITH

Decided November 14, 1942

GRAZING LICENSES—BASE PROPERTY—DEPENDENCY BY USE—DATE OF FILING APPLICATION.

The offer of base property in an application in one grazing district before June 28, 1938, the dead-line date fixed by regulation, is sufficient to preserve such dependency by use as would otherwise have created a qualified demand in another district, although the base property was not offered in the latter district until sometime in 1941.

GRAZING LICENSES—PARTICULAR RANGE—APPEALS—ADMINISTRATIVE DISCRETION.

While an applicant for a grazing license cannot demand, as a matter of right, that he be licensed in a particular district, since the assignment of the area of range to be used by a licensee is a matter within the discretion of the Grazing Service, the question of the proper exercise of discretion may be raised on appeal.

FORTAS, *Under Secretary:*

D. Sid Smith has appealed from a decision of an examiner of the Grazing Service which affirmed a decision of the acting regional grazier denying Smith's application for a 1942 grazing license, in Idaho Grazing District No. 1 (Owyhee).

The appellant applied for and received a 1942 license for approximately 10,000 sheep (exact number not disclosed by the record) in Idaho Grazing District No. 5 (Wood River), and an additional license in the same district for 1150 sheep, the latter being referred to by the Grazing Service as a "temporary license." On December 16, 1941, Smith filed an application to graze 1100 sheep from March 15 to May 15, 1942, on Federal range in District No. 1, but by notices of February 11 and February 27, 1942, the application was denied on the ground that the base property of the appellant which was offered in support of the license was not dependent by use, not having been offered prior to June 28, 1938, as required by section 2 (g) of the Federal Range Code. Smith appealed from this decision and the case was set for hearing at Boise, Idaho, on May 29, 1942.

At the hearing the examiner ruled that there was no dispute concerning the facts of the case, hence no testimony was taken. The

examiner drew up a stipulation of facts which was signed by the appellant and the acting regional grazier and approved by the examiner. On June 30, 1942, the examiner rendered his decision affirming the action theretofore taken. The present appeal followed.

The record shows that Smith has been a livestock operator for many years and that during the "priority period," i.e., the 5-year period immediately preceding June 28, 1934, he used range which now constitutes parts of districts numbered 1 and 5 for the grazing of his livestock. The greater part of such use appears to have been in District No. 5, but during 1932 and 1933 he grazed 1150 sheep on range which is now within District No. 1. Until December 16, 1941, when Smith filed the application involved in this appeal, his annual applications for licenses had requested permission to graze only in District No. 5, and were filed with the officer in charge of that district. Apparently the earliest of these previous applications was filed sometime prior to June 28, 1938, and listed all of the base property which Smith owns or controls. However, in view of the fact that he made no request to be licensed to use the range in District No. 1 prior to December 16, 1941, the acting regional grazier ruled that his properties were not dependent by use so far as such dependency might entitle Smith to a license in that district for the reason that they were not offered in that district prior to June 28, 1938.

Smith states in his appeal that the reason he did not request a license to graze in District No. 1 prior to 1941 was because in about 1934 his livestock operations had been reduced as a result of the prevalent economic depression. He indicates that such a reduction was made so that he could graze all of his sheep on the range closest to his ranch and thus cut down his operating costs. Presumably his operations resumed their normal scale in 1941 or 1942, and this, plus improved economic conditions, caused Smith to seek a license in District No. 1 where he had formerly grazed his sheep.

Apparently the licenses Smith holds in District No. 5 confer the full amount of grazing privileges to which he is entitled on the basis of the qualified demand of his base properties, and his application appears not to have contemplated an additional license for 1100 head of sheep, but merely a request that he be permitted to transfer 1100 sheep for which he is presently licensed in District No. 5 from the range in that district to the range in District No. 1. As stated above, he holds what is styled a "temporary" license in District No. 5 for 1150 sheep, and in view of the similarity in numbers, it is probable that the sheep that are included in this license are the ones that he desires to transfer. In fact, Smith states in the appeal that he wishes

to graze 1100 head of his sheep in District No. 1 rather than in District No. 5 "as at present."

While the examiner considered and reached a decision on several questions that arose during the discussions which preceded the drafting of the stipulations that were entered into, there is only one general question involved, and that is whether or not Smith should be permitted to transfer the 1100 sheep from District No. 5 to District No. 1. In fact, Smith does not insist as a matter of law or regulation that he is entitled to a license in District No. 1, but instead bases his appeal on the general proposition that, the range in District No. 5 being overcrowded and the range in District No. 1 being understocked, he should be permitted to transfer a part of his herd to the latter district. He objects to the examiner's refusal to hear testimony in support of his contentions that there is adequate range available in District No. 1 over and above the needs of the present licensees in that district and that the range in District No. 5 is overstocked.

The examiner disposed of the general question presented by citing the decision of the Department in the case of *National Livestock Company and Zack Cox*, A. 21222, decided July 7, 1938 (unreported), wherein it was held that the determination of the range to be used under a license is a matter solely within the discretion of the Grazing Service, and that no licensee can demand, as a matter of right, that he be permitted to use a certain area of range even though that area was the one the use of which served to create the dependency by use of the licensee's base property.

In order to reach a decision on the general question of Smith's right to receive a license in District No. 1, it is necessary to decide the following specific questions all of which, incidentally, are of novel impression in the Department:

1. Did Smith's offer of his base property in an application filed in District No. 5 prior to June 28, 1938, serve to preserve such dependency by use as would otherwise have created a qualified demand in District No. 1?
2. If the dependency by use was thus preserved, can Smith now demand, as a matter of right, that he be granted a license in District No. 1?
3. Regardless of how the above questions are decided, can Smith raise by way of appeal the question of the advisability of permitting him to graze 1150 sheep in District No. 1 instead of District No. 5?

Section 2(g) of the Federal Range Code, as revised to August 31, 1938 (43 CFR 501), which Code was in effect at the time of the hearing, reads as follows:

(g) *Land dependent by use.* Forage land which was used in livestock operations in connection with the same part of the public domain, which part is now Federal range, for any three years or for any two consecutive years

in the 5-year period immediately preceding June 28, 1934, and which is offered as base property in an application for a grazing license or a permit filed before June 28, 1938. Land will be considered dependent by use only to the extent of that part of it necessary to maintain the average number of livestock grazed on the public domain in connection with it for any three years or for any two consecutive years, whichever is the more favorable to the applicant, during the 5-year period immediately preceding June 28, 1934.

It will be noted that this part of the Code contained no specific requirement that the application in connection with which the base property is offered shall be filed in the district in which the dependency by use was created. Neither was there any such requirement in any other provision of the Code. Furthermore, the above-cited ruling in the *National Livestock Company* case, *supra*, to the effect that the range to be used by a licensee is a matter solely for determination by the Grazing Service would refute any assumption that such a provision is implicit in the Code, for if the Grazing Service is authorized to determine the area in which a licensee is to graze his livestock, regardless of the area of range used in creating the dependency by use, such authority is broad enough to support a ruling that a licensee shall use range in a different district from that in which he created the dependency by use and in which he had logically been expected to file his application. In other words, an operator might file his application in one district and, in the interest of proper range management, be licensed to graze in another district. In such circumstances it would be unreasonable to hold that his property failed to assume the attribute of dependency by use merely because no application was filed in the latter district.

Accordingly, it is held that the timely offer of the base property in District No. 5 was sufficient to preserve the dependency by use created in District No. 1, regardless of the fact that the lands were not offered in the latter district until 1941.

This conclusion, while it may result in some confusion in the administration of District No. 1 by requiring a possible readjustment of existing licenses and allotments therein, is no greater than might occur under certain other but somewhat related provisions of the Code. For example, if Smith had offered his base property in District No. 1 in an application filed, say, in 1936 but had not applied for a license during any ensuing year until 1941, his failure to have done so would not have prejudiced his rights to a license in the district, for the offer of the property in 1936 would have constituted a complete fulfillment of the requirement of section 2(g). No doubt his failure thus to have sought grazing privileges during the intervening years would have resulted in the distribution or allotment to other licensees of the range which he otherwise would have used. This

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would have resulted in a necessity for readjusting the licenses and allotments of these other licensees upon the issuance of a license pursuant to the 1941 application, a situation closely similar to the one which actually exists. Thus there is no reason to hold that, by reason of administrative necessity, the Code must be interpreted as having required that lands be offered before June 28, 1938, in the district in which dependency by use was created in order to preserve such dependency.

As for the second question presented, regardless of the fact that the dependency by use of Smith's property in District No. 1 has thus been preserved, there is no reason to hold under the existing circumstances that he is entitled as a matter of right to insist on a license in that district. According to the record, the qualified demand of his base property stemming from his prior operations in both districts has been fully recognized in the determination of the extent of the licenses which he has received in District No. 5. Such being the case, he cannot pyramid his qualified demand by insisting that a right recognized in that district shall receive equal recognition in another. As has been ruled above, the base property is dependent by use to the extent of 1100 sheep in District No. 1, and if he saw fit to do so Smith might assert his right to a license in that district upon agreement to a corresponding reduction in his license in District No. 5. This in effect is exactly what he has done, for he is asking to transfer 1100 licensed sheep from District No. 5 to District No. 1. However, again referring to the ruling in the *National Livestock Company* case, *supra*, even supposing Smith does agree to accept a reduction of his license in District No. 5 and obtains a license in District No. 1, it does not follow that he will be entitled to use the range in District No. 1, for if the regional grazer were to determine that the interests of proper range management and control require that Smith use range in District No. 5 instead of District No. 1, it would be proper so to rule. Again, this is in substance what has actually been done, for if the regional grazer has authority to require the exercise in District No. 5 of the privileges conferred by a license in District No. 1, then he likewise has authority to require that the privileges conferred by the licenses in District No. 5 shall be exercised in District No. 1. This has not been required, however, and thus it must be assumed that the regional grazer has determined, in his administrative discretion, that proper range management factors require that Smith's grazing activities on Federal range be restricted entirely to District No. 5. Thus it follows that Smith cannot demand that he receive a license in District No. 1.

There remains for discussion, therefore, only the question of whether or not Smith can raise by way of appeal the question of the advisability of permitting him to graze 1150 sheep in District No. 1. Smith insists that the range in District No. 5 is overstocked and overgrazed but that the range in District No. 1 is understocked and that it would better serve the interests of proper range management and result in better utilization of the forage resources of the Federal range if he were permitted to transfer 1100 sheep to the latter. The examiner refused to hear testimony on this point, but ruled in his decision that there was nothing to prevent the appellant from bringing the matter to the attention of the regional grazier through the medium of a written request to transfer a part of his grazing activities from District No. 5 to District No. 1, and that the regional grazier could grant such request if he saw fit. However, the examiner states that "it is clear that the grazing privileges or adjustment desired by the appellant would have an adverse effect upon other licensees," and by inference indicates that he does not consider the question one that can be the subject of an appeal.

There would appear to be no valid reason why a licensee should not be permitted to question by way of appeal the action of the Grazing Service in assigning certain range for his use when there is other range which he feels can be more conveniently and properly utilized by him. This of course does not mean that the question can be raised in instances where the desire of the licensee to use other range is prompted by mere whim and is unsupported by any allegation that such use is necessary in order to permit him to obtain the maximum benefits of his license. But in a case like the present wherein it is alleged that the range assigned for his use is overcrowded and the range to which he desires to transfer is understocked, no reason is seen why such an issue cannot be raised by an appeal and decided on the basis of evidence the same as other issues affecting the grazing privileges that a licensee is to enjoy.

It is true that Smith does not allege specifically that there is insufficient forage on his range in District No. 5 to provide ample grazing for his livestock, but such an allegation is to be inferred from the fact that he alleges that the range in District No. 5 is overstocked and also from the fact that the range in District No. 1 is farther from his base properties and thus less desirable, other factors being equal. As no evidence was taken at the time of the hearing and such statements as may have been made concerning the issues were not transcribed, it is not known whether or not such an allegation was specifically made at that time, but it can be assumed that Smith would not seek to transfer a part of his livestock to District No. 1 unless

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he was finding it difficult to obtain sufficient feed for such livestock in District No. 5.

Assuming then that Smith has explicitly or inferentially made an allegation to that effect in support of his request to transfer his sheep to District No. 1, an issue has been raised which questions the propriety of an administrative act of the Grazing Service which substantially affects Smith's grazing rights. As such, it is difficult to see wherein the right of appeal from such action should be any less secure than, for example, in a case wherein the action involves the extent of an applicant's qualified demand. Either involves substantial rights and is entitled to equal protection.

Such a conclusion having been reached, it is apparent that the examiner erred in refusing to permit Smith to pursue his appeal by the introduction of testimony bearing on the justification for the proposed transfer. Accordingly, the decision of the examiner is reversed and the case is remanded with instructions that a new date for hearing shall be set and the interested parties notified thereof.

Reversed.

THE SHEVLIN-HIXON COMPANY

Opinion, November 19, 1942

CLAIMS AGAINST UNITED STATES — PROPERTY DAMAGE — FIRE — NEGLIGENCE —
AVAILABILITY OF APPROPRIATIONS.

Claim for damage to privately owned timber resulting from necessary fires started by Bureau of Reclamation employees during brush clearing operations, but which became uncontrollable and spread because of high wind, is not allowable under act of December 28, 1922 (42 Stat. 1066, 31 U. S. C. sec. 215), in absence of negligence, but may be paid under appropriation act provision for "damages * * * by reason of the operations of the United States * * * in the survey, construction, operation, or maintenance of irrigation works," since the damage was the direct result of action by Government employees.

GRAHAM, *Assistant Solicitor:*

The Shevlin-Hixon Company, of Bend, Oregon, has filed a claim in the amount of \$1,757.62 against the United States for compensation for damage to timber owned by it, as the result of a forest fire which occurred during the construction of the Wickiup Reservoir, Deschutes project, during June 1940. The question whether the claim either should be allowed and certified to the Congress under the act of December 28, 1922 (42 Stat. 1066, 31 U. S. C. sec. 215), or should be paid under the Department of the Interior Appropriation Act, 1943 (56 Stat. 506), has been submitted to me for opinion.

It is my opinion that the claim cannot be considered under the 1922 act for two reasons, first because the amount involved exceeds the statutory limitation of \$1,000 and, secondly, because it does not appear that the damage was caused by the negligence of any officer or employee of the Government. It is my further opinion that the claim may be paid under the current appropriation act, *supra*, which makes available to the Bureau of Reclamation funds for the "payment of damages caused to the owners of lands or other private property of any kind by reason of the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works."

The area to be occupied by the reservoir was covered by a dense growth of so-called lodge pole or jack pine so that the clearing of the site required the cutting and removal of these trees and other brush. The accumulation of great quantities of this cut dry pine and brush constituted a serious fire hazard and the only practical method of removing it was by burning.

The adjacent public and privately owned lands were also similarly wooded and in addition contained some good stands of commercial timber including that owned by the claimant. For the protection of the privately owned lands, as well as the Government lands and the camp site and equipment of the contractor engaged in the construction project and as a general fire protection measure, it was also considered necessary and advisable to clear firebreaks or trails around the area to be cleared within the reservoir site. This had been the practice and, in addition to the burning of the material accumulated in clearing the reservoir site, firebreaks 200 feet wide were being burned at the same time.

Contact with the United States Forest Service was maintained constantly for the purpose of keeping advised as to prevailing weather conditions, since it was only feasible to undertake the burning operations during the most favorable periods—in a locality where such conditions were generally unfavorable due to continued dryness and shifting, variable and often high winds.

Conditions, as favorable as could be expected, appeared to exist on or about June 11, 1940, and, after consultation with the Forest Service and having obtained a burning permit from it, the fires were started. The work was under the general supervision of a Bureau foreman and the crews consisted of Civilian Conservation Corps enrollees under the supervision of an assistant leader. During the lunch period, on the eleventh, at which time the fires were burning and under control, eight men, including the assistant leader, were left to guard against spot fires while the remainder of the crew returned to camp for lunch.

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This was at about 11:30 and the weather conditions appeared to be suitable and the fireguards left seemed adequate to permit the release of the other men. At about noon there was a sudden shift in the wind, the fires got beyond control of the guards and, despite the efforts of hundreds of extra men who were immediately rushed to the scene, including many additional Civilian Conservation Corps enrollees, the employees of the contractor at the dam site, employees of the several timber companies in the locality, the Bureau's regular supervisory, mechanical and engineering employees, the fires increased in intensity and spread over the adjacent forest doing considerable damage. The fire was finally brought under more or less general control on the thirteenth, due to the efforts of the fire-fighting crews and a change in weather conditions which came to their assistance. No question is raised but that the claimant's timber was damaged as a result of the fire.

A most careful examination of the record would appear to indicate no evidence of negligence on the part of any Government officer, employee or Civilian Conservation Corps enrollee. There may have been errors in judgment, seen in retrospect, but even so they were obviously made in good faith. The original burning operation was undertaken because of necessity; it was a natural, necessary incident to the construction operations in progress and, while the possibility of sudden shifts in the winds might have been foreseen, the exigencies of the situation, the elimination or mitigation of the ever-threatening hazard of fire dictated the necessity for the action taken. Such had been the practice and the weather conditions presented appeared to be as favorable as could be expected. The conduct of all officials and employees in combating the fire and eventually bringing it under control, with the limited equipment at their disposal, would appear to have been expeditious, resourceful and effective. On the whole the incident must be found to have been due to unavoidable causes in which the element of negligence does not appear.

Nevertheless, the Congress has provided a remedy, as set forth in the current appropriation act, *supra* (identical provisions are found in the prior appropriation acts), whereby one who suffers damage to private property of any kind may recover where such damage is caused by the survey, construction, operation, or maintenance of irrigation works.

With respect to the payment of such damages under identical provisions of former similar appropriation acts, in reviewing the uniform rulings of the Comptroller General in analogous cases, the Attorney General in an opinion dated April 18, 1940. (39 Op. Atty. Gen. 425), stated:

In settling and adjusting claims arising under the latter statutes, the Comptroller General has held that they do not impose liability upon the United States for remote causes, such as the acts of *ferae naturae*, over which the United States has no direct control; and that to create liability the damage must arise from direct action on the part of an officer or employee of the United States in the survey, construction, operation, or maintenance of irrigation works, and must be due to unavoidable causes in which the element of negligence does not appear. Comp. Gen. Dec. A-47614, April 17 and August 5, 1933 (unpublished), in the *Sam Wade* case; Comp. Gen. Dec. A-45268, June 30, 1933 (unpublished), in the *C. J. Mast* case. See also 4 Comp. Gen. 713. [Italics supplied.]

Having determined that the damage was due to unavoidable causes in which the element of negligence does not appear, the question presents itself as to whether the damage suffered arose from the *direct* action on the part of the officers or employees of the United States. This is the sole test, as indicated by the Comptroller General and approved by the Attorney General, to be applied in arriving at a finding that recovery may be had under the provisions of the appropriation act. There can be no recovery where the cause is remote or beyond the control of the Government which includes results which are deemed to be merely consequential. A direct cause is comparable to the familiar theory of sole proximate cause as applied in negligence cases. This connotes a continuous, uninterrupted causal relation between the agency originally put into motion by the one sought to be charged and the happening of the event for which damages are claimed. The intervention of an additional effective cause operates to break the chain of causal relation and hence the damage suffered is not deemed direct but consequential for which there can be no recovery.

However, to be a direct result of an action it does not follow that it must also be the inevitable result or even a foreseeable one. It is sufficient if the chain of causation springs from the original action and continues to its ultimate result without the intervention of an additional effective cause. It might be argued that the sudden change in wind velocity constituted such an intervening cause. This is hardly tenable and the United States cannot be seen to avoid liability on that ground. Sudden changes of wind were the rule, not the exception, in this locality, but, despite the knowledge of this fact, it was necessary in the construction of the reservoir to assume the risk entailed in burning the clearing and firebreaks. The construction of the reservoir site required the clearing of the entire area to be occupied by it which resulted in the accumulation of great quantities of cut dry trees and brush. The safety of the entire project and adjacent lands required the elimination of this and all other fire hazards so far as possible. Ordinary care, diligence and foresight dictated its necessity even at the risk involved. Sudden shifts in wind were not un-

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expected such as to make them remote possibilities. Their threat was ever present, known and guarded against in so far as was possible, but their effect would have been nil without the overt action of the Government in putting into operation the instrumentality which could render a sudden change of wind a dangerous element, namely the fire started by it and necessarily utilized in the efficient, economic and safe construction of the reservoir. Accordingly, it is my opinion that the damage suffered by this claimant was the result of the direct action of the officers or employees of the United States, for which it should be compensated.

The claim is supported by the affidavits of Mr. J. H. Meister and Mr. E. L. Shevlin, Logging Superintendent, and Vice President of the Shevlin-Hixon Company, respectively, indicating in detail the methods of computation and costs employed in arriving at the amount of damage. The report of Mr. Don H. Peoples, a disinterested appraiser appointed by the Bureau to examine into the appropriateness of the methods and costs employed in arriving at the amount of the claim, states that:

It would appear, therefore, that the claim of the Shevlin-Hixon Company for excess costs of \$1,757.62 for the logging of 1,880,360 feet of burned timber is not out of line and comes within the estimates of experienced operators in this area.

This opinion appears to have been adopted by Mr. C. H. Spencer, Construction Engineer, Bureau of Reclamation, in his supplemental report dated September 21, 1942. The amount claimed and the methods of computation employed would appear to be consistent with the known facts, the prevailing costs, and the generally accepted practices of the industry. The evidence submitted by the claimant, as verified by the appraiser's report and the comments of the construction engineer, is accepted as satisfactory proof of the amount of damage suffered and the claim therefore should be paid in the sum of \$1,757.62.

Approved:

ABE FORTAS,

Under Secretary.

BOLTEN AND DAVIS LIVESTOCK COMPANY ET AL.

Decided November 19, 1942

GRAZING LICENSES—ALLOTMENTS—AGREEMENTS.

Section 6, paragraph (d), of the Federal Range Code (7 F. R. 7685), provides that "allotments of Federal range will be made to licensees or permittees

when conditions warrant, and divisions of the range by agreement or by former practice will be respected and followed where practicable." *Held*, that this provision refers only to the particular areas of range, or the boundaries thereof, upon which a licensee or permittee shall graze his livestock, and does not authorize the substitution of such agreements for the adjudication of applications according to the standards defined elsewhere in the Federal Range Code.

FORTAS, *Under Secretary*:

The Bolten and Davis Livestock Company and Isadore Bolten have appealed from a decision of an examiner of the Grazing Service which held that an agreement for the distribution of grazing privileges in Wyoming Grazing District No. 3 (Divide) should be enforced and applied in the granting of grazing licenses for the 1942 grazing season. The matter is confused and requires a somewhat detailed explanation to show how the appeal arose.

It appears that Isadore Bolten, who is an individual livestock operator in the district, is also the vice president and general manager of the Bolten and Davis Livestock Company, a corporation which leases approximately 80,000 acres of land in Wyoming as a base for a livestock operation utilizing Federal range in the district. The corporation is the successor in interest of the Kindt Sheep Company. Bolten is also acting as manager of the W. C. Sheep Company, which was originally a partnership consisting of Bolten and one N. R. Greenfield, the latter now deceased. This company also carries on a livestock operation in the district. In view of Bolten's managership of the livestock operations of the two companies, all applications for grazing licenses have been made in their names by Bolten. In addition, he has made applications for licenses in connection with his own livestock operation which, nominally at least, is carried on as a separate and distinct operation. Applications have thus been made by him on behalf of the three operations since and including the year 1937, and licenses were issued which, in the aggregate, called for the following grazing privileges to be enjoyed by the three parties: 1937—4642 animal-unit months; 1938—2936 animal-unit months; 1939—7640 animal-unit months; 1940—3210 animal-unit months; 1941—2468 animal-unit months.

According to statements by the regional grazier for Wyoming, these licenses were, up to and including 1939, granted in conformity with the applications that were filed, and without adjudications under the Federal Range Code, the factual data necessary to such adjudications not having been compiled. After a consideration of the applications for 1941 licenses had resulted in a granting of a license totaling only 2468 animal-unit months for the two companies and Bolten, Bolten

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filed appeals on his own behalf and on behalf of the two companies. These appeals were set for hearing at Rawlins, Wyoming, on June 26, 1941, but at that hearing only the appeal of the Bolten and Davis Livestock Company was heard. On August 8, 1941, a decision on this appeal was rendered by the examiner that heard the case, but upon petition by the interveners who had appeared at the hearing, the decision was vacated. Before the appeal was again set for hearing, an agreement was reached by Bolten on behalf of the two companies and himself, which agreement was reduced to writing and ratified by Bolten and numerous other operators in the district as of February 28, 1942. In the meantime the appeals of the W. C. Sheep Company and of Bolten had been set for hearing on October 7, 1941, but at that time Bolten withdrew the appeals and entered into a signed agreement regarding the grazing privileges that the two companies and Bolten would enjoy in the district.

The agreement of February 28, 1942, in effect rescinded the provisions of the agreement of October 7, 1941, and provided that the two companies and Bolten should together be entitled to licenses calling for the grazing of 13,640 sheep for 28 days, and a permit to trail that number of sheep for 12 days, during each year. The agreement made no mention of how these privileges would be divided among the three parties.

The record is somewhat hazy as to the action taken subsequent to February 28, 1942. However, on April 27, 1942, Roblin H. Davis and Ellen Davis, who allege that they are the owners of 76,480 acres of land which is leased by the Bolten and Davis Livestock Company, filed an appeal. In the appeal they alleged that, pursuant to an application filed on behalf of the two companies and Bolten on March 5, 1942, it was ruled that a license would be issued to the three parties for the grazing of 13,640 sheep for a total of 28 days in April and November 1942. Apparently the application had requested a license to graze an additional 12,150 sheep during the entire months of April and November 1942, for the notice which issued in response to the application contained the following notation:

REJECT Application dated March 5, 1942 for 12,150 sheep. Nov. 1 to Dec. 1, 1942 Shell Creek Unit. April 1 to May 1, 1942 Shell Creek Unit. For the reason that the application does not conform with agreement of Feb. 28, 1942.

The appeal was based on the claim of the Davises that the lands that they own and that are leased to the Bolten and Davis Livestock Company are Class 1 lands and have a qualified demand for grazing privileges far in excess of that which would be represented by the Bolten and Davis Livestock Company's proportionate share of the

license for 13,640 sheep, that during at least two years of the priority period (the five-year period immediately preceding June 28, 1934) the Kindt Sheep Company, predecessor to the Bolten and Davis Livestock Company, owned and grazed 16,500 sheep from April 1 to May 1 and October 1 to December 10 during each year, that during those years the Davis lands constituted virtually all of the base property of the Kindt Sheep Company, and that in 1939 the Kindt Sheep Company received a license for 13,500 sheep to be grazed from October 1 to December 10, 85 cows and 15 horses to be grazed from May 1 to November 1, and 25 horses to be grazed from November 1 to December 1. It is then contended that the action of the Grazing Service reducing the grazing privileges based on their lands serves to deprive them of property rights without notice or opportunity to be heard, and that Bolten's signing of the agreement of February 28, 1942, was ineffectual for the reason that the dependency by use of the base property attaches to the land and, thus being an interest in real property, a diminution thereof without notice would be violative of Constitutional guarantees. Also, they denied Bolten's authority to take action in their behalf that would thus reduce the grazing privileges that would otherwise be attached to their lands. In addition to this appeal, Mrs. Minnie Carr Greenfield, the executrix of the estate of the deceased N. R. Greenfield, mentioned above as having been the sole partner of Bolten in the W. C. Sheep Company, filed an appeal on April 28, 1942. The contentions in this appeal were essentially the same as those made by the Davises. However, Mrs. Greenfield withdrew her appeal during the course of the subsequent hearing.

Pursuant to these appeals the cases were set for hearing at Rawlins, Wyoming, on July 22, 1942. At the hearing the Davises, Bolten, and Mrs. Greenfield were present and were represented by counsel. In addition, a group of 20 licensees who graze in the same unit of the district as do the appellants were permitted to intervene. They were also represented by counsel.

The hearing was more or less informal and the record consists largely of statements by counsel, the regional grazer, and the examiner. No witnesses were called. After counsel had submitted their statements regarding the contentions of the various parties, the examiner closed the hearing on the ground that no basis for an appeal had been presented, and made a series of findings and rulings which, in condensed form, were substantially as follows:

1. That the appellants, since the inception of the administration of the grazing district, have never complained concerning the extent of the grazing privileges that have been granted to the Bolten and

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Davis Livestock Company, the W. C. Sheep Company, or Isadore Bolten, on the basis of their base property holdings.

2. That such being the case, the appellants have slept on their rights and cannot at this time object to the action Bolten has taken in regard to the licenses issued on the basis of their lands.

3. That Bolten entered into the agreement of February 28, 1942, on behalf of the two companies and himself, which agreement was also subscribed by the interveners and other interested licensees; that the agreement purported to settle by compromise the question of the grazing privileges that the various subscribers would enjoy in the district; and that the agreement was approved by a representative of the Grazing Service.

4. That the agreement is in substantial accord with the licenses theretofore issued to the two companies and Bolten, and no objection had been made by any of the three parties or the Davises. That the 1939 license was in error in that it granted grazing privileges far in excess of the qualified demand of the base properties of the three parties, but that such error was corrected in 1940 and 1941 when licenses were issued in the light of certain data regarding the base properties that had not theretofore been available.

5. That there is no question as to the number of livestock grazed by the two companies and Bolten during the priority period, the sole question being the period of time they were grazed in the Shell Creek Unit of the district during said period.

6. That the Davis lands have dependency by use because of the operations of the two companies and Bolten; that the dependency by use having been established by the operations of the lessee, "he [Bolten] has ample authority to enter into any agreement regarding the extent of the dependency by use and the grazing privileges to be awarded" on the basis of the base properties owned or controlled by the companies; that the licenses issued to the two companies and Bolten should be limited to the total amount of grazing privileges set out in the agreement of February 28, 1942; and that the district grazer should set up allotments as soon as possible in accordance with the terms of said agreement.

On August 3, 1942, the examiner rendered his decision in accordance with the above rulings and findings, and dismissed the appeal. On August 26, 1942, an appeal from this decision was filed direct in the Department on behalf of the Bolten and Davis Livestock Company and Bolten.

An appeal at this time by these two parties is somewhat irregular. As shown above, only the Davises and Mrs. Greenfield were appellants at the hearing, the appeals of the two companies and Bolten

regarding their 1941 grazing privileges being moot at the time of the hearing, and also having been disposed of by the agreements of October 7, 1941, and February 28, 1942. Neither the Bolten and Davis Livestock Company nor Bolten formally entered the hearing. Thus their appeal is technically one from a decision in a case to which they were not parties. However, in view of the peculiarly allied interests of the parties and the desirability of reaching a determination of the proper distribution of grazing privileges in the district, and also in view of the fact that the decision of the examiner appears to have been reached on the basis of an erroneous interpretation of the provisions of the Federal Range Code, the appeal will be considered as though regularly before the Department.

The appeal is somewhat discursive and not clearly indicative of the exact points wherein issue is taken. However, it is clear that the appellants are dissatisfied with the joint license that has issued to the two companies and Bolten under the terms of the agreement of February 28, 1942, and that they feel that the agreement should be disregarded and that the rights of the appellants should be readjudicated. It is the opinion of the Department that the contentions thus made are sound and that the decision of the examiner should be reversed.

The provision for agreements in connection with grazing privileges appears in section 6, paragraph (d), of the Federal Range Code. This provision, as it appeared in the Code as revised to August 31, 1938 (43 CFR 501), and as it now appears in the Code approved September 23, 1942 (7 F. R. 7685), reads as follows:

Allotments of Federal range will be made to licensees or permittees when conditions warrant, and *divisions of the range by agreement* or by former practice will be respected and followed where practicable. [Italics supplied.]

It will be noted that this provision relates only to divisions of the range, i.e., to the question of the particular areas of range upon which a licensee or permittee shall graze his livestock or of the boundaries thereof, and does not contemplate the substitution of agreements for the adjudication of applications as required by other sections of the Code. All that was ever intended by the provision was that licensees or permittees could agree on range or allotment boundaries and that such agreements would be respected where practicable.

But an agreement between licensees cannot obviate the necessity for adjudication of applications so far as numbers of livestock and times of grazing are concerned, for if such were permitted, the provisions of the Code governing the adjudication of applications would become a nullity or at least of no binding effect. The Code provides

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for the consideration of applications in the light of such dependency by use, dependency by location, and priority, as may be attributable to the base properties offered, and for the issuance of licenses or permits to such extent as these attributes may warrant, subject to reductions to meet the carrying capacities of the base properties and of the range. Also, section 18(b) of the Taylor Grazing Act (act of June 28, 1934, 48 Stat. 1269, as amended July 14, 1939, 53 Stat. 1002, 43 U. S. C. sec. 3150-1), requires that advisory boards "shall offer advice and make a recommendation on each application for * * *" licenses and permits within their districts, and this statutory requirement is carried over into the Code (Section 12). Thus in addition to the fact that there are no provisions of the Code that would permit an applicant in effect to determine the extent of his own license, it is also apparent that such a provision cannot be considered implicit in the rules or a necessary administrative device, for if such were the case, not only the explicit adjudicative rules of the Code would be nullified but compliance with the statutory requirements of the Taylor Grazing Act would become a mere empty gesture which could be set aside at the whims of the licensees involved.

It may also be pointed out on the basis of reason that agreements of this type, if permitted and enforced in all cases, could easily result in a monopoly of the grazing privileges to be enjoyed in a certain area, for in such circumstances it would be possible for one licensee who was desirous of increasing his operations to obtain by purchase the agreements of other licensees to reduce the size of their operations or to waive their qualified demands for grazing privileges.

Turning then to the agreement herein in question, it is apparent that it cannot be upheld as binding either on the parties signatory or on the Grazing Service. It is not an agreement as to range or allotment boundaries, but merely provides, in substance, that thenceforth the maximum number of livestock to be grazed in any one year by the two companies and Bolten shall aggregate not more than 13,640 sheep to be grazed for 28 days and trailed for an additional 12 days. There is no contention by the Grazing Service that this represents any outcome of an attempt to adjudicate the rights of the three parties and, in fact, contains no statement of what the individual rights of the parties shall be. It is true that the agreement provides that an allotment shall be determined and set aside for the use of the parties, but this is in no sense an agreement as to a division of range and thus does not become entitled to such protection as may be afforded by the quoted provision of section 6, paragraph (d) of the Code.

If it were shown that some adjudication had been made to determine the respective licenses to which the two companies and Bolten were entitled, and that the terms of the agreement were substantially in accordance with such determinations, there would be strong reason to hold that it should be supported on the ground that the parties signatory had created an estoppel against their appeal for greater licenses. But this does not appear to have been the case. The record is silent as to certain facts that would enable the Department to determine the degree with which the terms of the agreement approach the results that would be obtained by an actual adjudication of the rights of the parties. For example, the amount of horizontal reductions which may have been imposed on the various licensees is not disclosed. However, the regional grazier has stated (Tr. 8) that for two years of the priority period the Bolten and Davis Livestock Company or its predecessor in interest grazed an average of 14,665 sheep. The regional grazier also stated (Tr. 9) that the W. C. Sheep Company ran approximately 2,500 sheep during the priority period. Also, Bolten's property is dependent by use to some extent. Considering only the properties of the first two licensees, however, it is apparent that, on the basis of prior use, they alone are dependent by use to the extent of approximately 17,165 sheep. The properties are fully "commensurate," i.e., capable of producing adequate feed for this entire number of sheep during the time they are off of the Federal range, and thus the three parties are apparently entitled to a license for something in excess of 17,165 sheep, less such reduction as may be necessary to meet the carrying capacity of the range. This and the general impression to be gained from a reading of the record in the case indicates that the agreement in no respect reflects adequately the grazing privileges that would be enjoyed by the various parties to the case were their applications adjudicated under the provisions of the Code.

Thus in addition to the fact that the agreement in question is not of the type contemplated by the above-quoted provision of section 6(d) of the Code, *supra*, it cannot be sustained on the ground that it reflects substantially the results of an adjudication or acts by way of estoppel.

Accordingly the decision of the examiner is reversed with instructions that the applications of the various parties shall be considered in the light of the adjudicative provisions of the Code and without recourse to the terms of the agreement of February 28, 1942.

Reversed.

PAYMENT OF THE SALARIES OF GOVERNMENT PERSONNEL ON
LEAVE ASSIGNED TO COOPERATIVE WORK

Opinion, November 19, 1942

COOPERATIVE AGREEMENTS—BUREAU OF MINES—GOVERNMENT EMPLOYEES—PAY-
MENT OF SALARIES WHILE ON LEAVE.

The contribution of a private corporation to a joint investigation with the Bureau of Mines cannot be made by paying the salaries of Bureau personnel who are placed on leave without pay and assigned to the joint work while on a leave status. The contribution of the party cooperating with the Bureau may be made by payment to the Bureau, and may be measured by the salaries and expenses of the Bureau's personnel assigned to the joint work.

LLOYD, *Assistant Solicitor*:

I have been asked to reconsider my memorandum of October 1, which referred to a draft of a cooperative agreement of the Bureau of Mines with American Alloys and Chemical Corporation which had been informally submitted to this office by Mr. Raushenbush. In my memorandum I pointed out that paragraph 3 of the proposed contract, providing that the cooperating corporation shall pay the salaries and expenses of employees of the Bureau assigned to the joint investigation, is not lawful in its present form, and suggested another way of accomplishing the same purpose, to wit: that the Corporation should pay its contribution to the Bureau, as is provided for in the appropriation under which the work is to be done, and the Bureau itself pay its own employees. It appears from conferences with Mr. Ambrose that the suggested arrangement is not satisfactory to the Bureau and that the Bureau wants to detach two men on leave without pay and assign them to the Corporation for services at its plant at San Francisco, California, to assist the Corporation in developing its methods of producing manganese there. The men so detached would not be used in connection with the cooperative work at the Government's pilot plant at Boulder City, contrary to the provisions of paragraph 3 of the contract submitted.

The provision in question as it now stands is that: "The Corporation will pay the salaries and expenses of such employees of the Bureau as may be furloughed and assigned to the investigation." Inasmuch as the investigation is joint and for the joint benefit and interest of the Government and the Corporation, and under the direction of the Bureau, Government employees assigned to it would, in my opinion, continue to be in the Government's service, even though on leave without pay, and drawing their compensation from the Corporation. I am unable to change the opinion expressed in my

previous memorandum that this is in violation of the act of March 3, 1917.¹

I do not say, however, that it is a violation of the statute for a Government employee on leave without pay to work for and draw a salary from a private concern. What a Government employee does with his time while on leave is his business.² On the other hand, if the Government, in granting the leave without pay, assigns the employee to some special work with a private concern, this seems to indicate that the employee is actually acting in an official capacity while drawing his salary from a private source. And where the work to be done is cooperative, and under the direction of the Government, I believe that it is plain that a Government employee assigned to the work cannot be paid by the private party cooperating with the Government.

The prohibition of the statute is limited to the receipt of salaries from private sources, and does not extend to reimbursement for expenses incurred.³ Mr. Ambrose has asked me to draft a paragraph that will cover the payment by the Corporation of travel costs and subsistence of Government employees and the cost of supplies used in the joint investigation. If the Bureau would rather limit the payments to be made by the Corporation to these items, rather than to adopt the suggestion previously made of providing that the Corporation make a money contribution to the Bureau to cover all desired items, including pay of Government personnel, it may be done as follows:

3. *Corporation Contribution.* The Corporation shall pay the following:
 - (a) The necessary actual costs of travel of Government personnel specially assigned to the cooperative work.
 - (b) The subsistence of Government personnel specially assigned to the cooperative work, during the time that they are actually engaged therein, on the same basis that the Government would pay them, and at a rate per diem not in excess of the statutory rate in effect at the time.
 - (c) The cost of all necessary reagents and chemicals other than those readily available in the Bureau, in a total sum not in excess of \$5,000.

The foregoing payments will be made by the Corporation to the persons concerned upon monthly statements and invoices which the Bureau will forward to the Corporation.

The Corporation shall deliver to the Bureau, free of charge, at its pilot plant at Boulder City, Nevada, or at any other laboratory of the Bureau which it may designate, raw materials from its manganese properties for use in the joint work.

¹39 Stat. 1106, 5 U. S. C. sec. 66; 11 Comp. Gen. 153.

²32 Op. Atty. Gen. 309.

³33 Op. Atty. Gen. 273.

**DISPOSITION OF PROCEEDS OF CEDED INDIAN LANDS INCLUDED
WITHIN GRAZING DISTRICTS OR LEASED AS ISOLATED TRACTS
UNDER TAYLOR GRAZING ACT OF JUNE 28, 1934**

*Opinion, November 21, 1942**

INDIAN LANDS—INCLUSION OF CEDED LANDS WITHIN GRAZING DISTRICTS.

Ceded Indian lands are "vacant, unappropriated and unreserved lands" within the meaning of section 1 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269, 43 U. S. C. sec. 315 *et seq.*), and such lands may therefore be included within grazing districts in the discretion of the Secretary of the Interior.

**INDIAN LANDS—DISPOSITION OF PROCEEDS OF CEDED LANDS INCLUDED WITHIN
GRAZING DISTRICTS.**

When ceded Indian lands have been included within grazing districts, the proceeds must be disposed of in accordance with section 11 of the Taylor Grazing Act which is expressly applicable to "Indian lands ceded to the United States for disposition under the public land laws." The Indians who ceded the lands are therefore entitled to only 50 percent of the proceeds.

**INDIAN LANDS—CONSISTENCY OF SECTION 11 OF TAYLOR GRAZING ACT WITH THE
PROVISIONS OF ACTS OF CESSION.**

There is no conflict between section 11 of the Taylor Grazing Act and the provisions, as to disposition of proceeds, contained in the acts of June 15, 1880 (21 Stat. 199) and February 20, 1895 (28 Stat. 677), by which the Ute Indians ceded their lands, and the acts of February 20, 1893 (27 Stat. 469) and June 10, 1896 (29 Stat. 321), by which the San Carlos Indians ceded their lands. While under these acts of cession the Indians were to receive all of the proceeds, it may well be presumed that the 50 percent of the proceeds which will not go to the Indians will be used by the Department of the Interior and the State to increase the value of the land itself. Moreover, section 11 of the Taylor Grazing Act expressly provides that ceded Indian lands shall continue to be subject to disposition under the "applicable public land laws" despite inclusion in a grazing district. When incorporation of ceded Indian lands in grazing districts would be disadvantageous to the Indians, the Secretary of the Interior may protect their interests by declining to take such action.

**INDIAN LANDS—DISPOSITION OF PROCEEDS UNDER SECTION 11 OF TAYLOR GRAZING
ACT NOT AFFECTED BY WITHDRAWAL UNDER INDIAN REORGANIZATION ACT OR
CONDITIONAL CONSENT TO INCLUSION WITHIN GRAZING DISTRICTS.**

The normal application of section 11 of the Taylor Grazing Act to ceded Indian lands is not affected by the fact that they had been temporarily withdrawn from entry by the Secretary of the Interior pending consideration of their restoration to Indian ownership under section 3 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 25 U. S. C. sec. 463), or by the fact that the consent to the inclusion of the lands so withdrawn was given under section 1 of the Taylor Grazing Act "with the understanding that this agreement will in no way jeopardize the right, title

* Memoranda referred to in this opinion may be found in the files of the Solicitor's Office.

and interest of the Indians in and to these lands." Once this consent was duly given, the order of withdrawal had no further operative effect, and could not prevent the disposition of the proceeds according to the terms of the statute. The Secretary of the Interior could not in effect be given a power to include land within a grazing district and yet suspend the application of section 11 of the Taylor Grazing Act. Consent could not be conditionally given, particularly in view of the fact that the act itself was designed to protect the interests of the Indians by continuing the applicable public land laws in operation with respect to such ceded Indian lands as were included within grazing districts.

INDIAN LANDS—DISPOSITION OF PROCEEDS OF CEDED LANDS LEASED AS ISOLATED TRACTS UNDER TAYLOR GRAZING ACT.

The Indians are, however, entitled to all of the proceeds of ceded lands which have been leased as isolated tracts under section 15 of the Taylor Grazing Act, since the act contains no express provision for the disposition of the proceeds of such leased tracts. Section 10 of the Taylor Grazing Act, which is the general provision of the act governing the disposition of proceeds does not expressly mention ceded Indian lands either as originally enacted, or as amended by the act of June 26, 1936 (49 Stat. 1976, 1978). Although section 10 of the act refers generally to "moneys received under the authority of this Act," it may be assumed that Congress was referring only to such moneys which the United States was entitled to receive in its own right as proprietor and not to those received only by reason of a trust relationship. As between two competing interpretations of section 10, choice must be made in the light of the settled rule of construction that in the field of Indian legislation ambiguities are to be resolved in favor of the Indians.

GARDNER, Solicitor:

You [Secretary of the Interior] approved on January 20, 1942, a letter transmitting to me certain files "containing correspondence relating to the disposition of grazing fees collected by the Grazing Service and by the General Land Office from the leasing of undisposed-of ceded Indian lands in Colorado and Arizona." Accompanying this file is a letter, dated January 19, 1942, addressed to you by the Assistant Commissioner of Indian Affairs, recommending that in view of the differences of opinion as to the disposition of these fees prevailing in the Grazing Service, the General Land Office, and the Office of Indian Affairs, the question be referred to me for an opinion.

The lands in question in Colorado are those ceded by the Confederated Bands of Ute Indians under the act of June 15, 1880 (21 Stat. 199), and by the Ute Indians under the act of February 20, 1895 (28 Stat. 677), except for those lands to which the Indian title was extinguished by the act of June 28, 1938 (52 Stat. 1209). The lands in Arizona are those ceded by the Indians of the San Carlos Reservation under the acts of February 20, 1893 (27 Stat. 469), and June 10, 1896 (29 Stat. 321, 358).

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Under these acts of cession the Indians were entitled to receive the proceeds that should accrue from the disposition of the ceded lands. The lands involved in the present submission never were disposed of. In 1934, the policy of disposing of ceded Indian lands and other public lands to homesteaders was modified in two ways. The act of June 18, 1934 (48 Stat. 984, 25 U. S. C. sec. 461 *et seq.*), authorized the Secretary of the Interior to restore ceded lands to Indian tribal ownership if he should find such restoration to be "in the public interest" (sec. 3, 25 U. S. C. sec. 463). The Taylor Act of June 28, 1934 (48 Stat. 1269, 43 U. S. C. sec. 315 *et seq.*), authorized the Secretary of the Interior, in his discretion, to incorporate "vacant, unappropriated, and unreserved lands from any part of the public domain" into grazing districts (sec. 1, 43 U. S. C. sec. 315), within which permit fees were to be charged and the proceeds distributed on the basis of a prescribed statutory formula. This formula, in the case of "Indian lands ceded to the United States for disposition under the public-land laws," made 25 percent of the receipts "available for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements"; another 25 percent was to be expended by the State "for the benefit of public schools and public roads of the county or counties in which such grazing lands are situated"; the remaining 50 percent was to be "deposited to the credit of the Indians" (sec. 11, 43 U. S. C. sec. 315j). Thus the Secretary in his discretion could make any of three choices with respect to these lands. He might return them to the original Indian owners; he might include them in grazing districts; or he might leave them *in statu quo*.

In fact, 200,000 acres of the ceded Ute lands were ordered restored to tribal ownership on September 14, 1938. Other ceded lands, after having been temporarily withdrawn from entry, by an order dated September 19, 1934, pending consideration of their restoration to Indian ownership, have been, from time to time, included in grazing districts. The approval of the inclusion of the Ute lands within grazing districts was given on April 30, 1935, "with the understanding that this agreement will in no way jeopardize the right, title and interest of the Indians in and to these lands," and approval was similarly given to the inclusion of the San Carlos lands on November 25, 1936, "provided that any action taken to place these lands under range management shall be consistent with any prior valid withdrawal from entry, and that the right, title, and interest of the Indians in and to these lands shall in no way be jeopardized."

By arrangements made by the Indian Office with the Grazing Service and the General Land Office, the lands within grazing districts have been administered by the Grazing Service while the leasing of the lands not within grazing districts has been entrusted to the General Land Office. Fees have been collected as a result of the issuance of permits to use the lands within grazing districts, and rentals have been obtained as the result of the leasing of lands not included within grazing districts. It now becomes necessary to determine how these proceeds are to be disposed of.

The position of the Indian Office is that since the lands in question are ceded lands of the type eligible for restoration to tribal ownership under section 3 of the Indian Reorganization Act, the Indian title to the lands so ceded has not been extinguished, and that any proceeds derived from such lands, which by the acts of cession were to be held by the United States in trust for the Indians, belong in their entirety to the Indians who ceded the lands. The Indian Office further contends that, even if the Taylor Grazing Act should be construed to permit the payment to the Indians of less than 100 percent of the fees and rentals from ceded lands, the application of the act has in effect been suspended by the temporary withdrawal of the lands in question by the order of September 19, 1934.

The Grazing Service, however, has maintained that fees collected for grazing district permits should be distributed in accordance with section 11 of the Taylor Grazing Act, under which the Indians would receive only 50 percent of the proceeds. The General Land Office, moreover, has argued that, since section 11 of the Taylor Grazing Act applies only to the disposition of moneys from Indian ceded lands within grazing districts, the moneys derived from Indian ceded lands outside of grazing districts, leased in accordance with section 15 of the Taylor Grazing Act, should be treated in the same way as all other proceeds derived from the disposition of public lands and distributed in accordance with section 10 of the act.¹

¹The Department has also had some correspondence with the office of the Comptroller General which on various occasions has given instructions or opinions relating to the proper disposition of the proceeds of the ceded Indian lands, in view of the provisions of the Taylor Grazing Act. The purport of this correspondence is not entirely clear but it seems that the office of the Comptroller General disagreed with the views of the Indian Office, possibly because the character of the particular Ute and San Carlos lands was not made entirely clear. It is extremely doubtful in any event that the office of the Comptroller General intended to do more than express tentative opinions pending the ultimate determination of the legal questions involved. With respect to the ceded Indian lands included within grazing districts, it finally stated that "in the event that there has been inadvertently included in grazing districts Indian trust lands as defined by the Supreme Court of the United States in *Ash Sheep Company v. United States*, 252 U. S. 159, and grazing permits issued thereon, this office will interpose no objection to handling receipts therefrom as trust fund moneys pending a determination as to a proper disposition thereof."

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I am of the opinion that with respect to lands included in grazing districts the contention of the Grazing Service is sound, and the statutory division of income prescribed by section 11 of the Taylor Act is applicable, but that with respect to isolated lands, not covered by section 11, the entire income is payable to the Indians.

There is no doubt that when the Taylor Grazing Act took effect it permitted the inclusion within a grazing district of undisposed-of Indian ceded lands. As has already been noted, section 11 of the Taylor Grazing Act covers "Indian lands ceded to the United States for disposition under the public land laws." This description is clearly applicable to the Indian ceded lands included in the grazing districts here in question. Such lands were "vacant, unappropriated and unreserved lands" within the meaning of section 1 of the statute because they had always been held to be subject to withdrawal in the same way as public lands (memorandum of the Solicitor, Department of the Interior, September 17, 1934). The Director of Forestry in the Indian Office so understood the purpose of the act at the time of its consideration. Indeed he opposed its passage on the ground that it might cut down the income obtained by the Indians from the ceded lands. (See his memorandum of June 13, 1934, to the Secretary of the Interior included in the legislative file.) The purpose of section 11 was thus described in the official correspondence of the Department during the drafting period:

Section 11 deals with lands which have been ceded to the United States by Indians for disposition under the public land laws upon condition that the receipts therefrom shall be credited to the Indians.

The legislative file also shows that in the original draft of the act provision was made for paying the whole of the proceeds of Indian ceded lands included within a grazing district to the Indians entitled to such proceeds under the applicable act of cession, except for 15 percent of such proceeds which were to be applied to range improvement and maintenance. The percentage of the Indians was progressively reduced in subsequent drafts. It is apparent from its legislative history that section 11 of the act would not apply to lands which had been ceded outright by the Indians, for it would then apply virtually to the whole public domain. The lands to which reference was made in section 11 could only have been lands the receipts from which were to be credited to the Indians.

In view of this legislative history and the clear language of section 11, it would take a very strong argument to persuade me that this section does not apply to these lands.

The argument advanced by the Indian Office against the applicability of the Taylor Act formula to these lands assumes a conflict

between the promises made to the Indians in the original acts of cession and the statutory formula of the Taylor Act. On the basis of such a conflict it is argued that the later legislation, general in its scope, should be so construed as not to apply to the lands covered by the earlier specific acts of cession. If there were in fact an irreconcilable conflict between the promises with respect to land disposition contained in the earlier legislation and the methods of disposition embodied in the later legislation, there would be much force in this argument. See *Chippewa Indians v. United States*, 305 U. S. 479, where the Supreme Court held that creation of a national forest on ceded lands amounted to a "taking" of the land, for which compensation was due. But I am of the opinion that no such incompatibility can be found in the language of the statutes here involved. The Taylor Act covers situations, for example, where Indians have been receiving no income from their ceded lands and where prospects of ultimate sale of these lands to homesteaders have become dimmer over the decades. In such a situation it offers a mechanism of rental, in which the Federal Government bears the expenses of a rental agent. While it is true that the Indians receive only 50 percent of the cash income, this is, in many cases (and apparently in the case of the San Carlos lands here involved) just that much more than they received before. Congress had reason to believe that the remainder of the income would be expended by the Department of the Interior and the State in such a way as to increase the value of the land itself. Moreover, the Taylor Act expressly provided that ceded Indian lands should continue to be subject to disposition under the "applicable public lands laws" despite inclusion in a grazing district. (Sec. 11, 43 U. S. C. sec. 315j.) In these circumstances the incorporation of ceded lands in a grazing district might be advantageous to the Indians and thoroughly consistent with earlier commitments to them and with the position of the United States as a trustee. True, there might be situations where incorporating ceded lands in a grazing district would cut off imminent sales and deprive the Indians of reasonably expected revenues. But the Secretary of the Interior is under no compulsion to add Indian lands to Taylor Grazing districts in such circumstances. Congress had a right to expect that the Secretary of the Interior, the chief officer of the Federal Government charged with the protection of Indian rights and Indian welfare, would exercise the discretionary powers conferred in such a way as to protect Indian interests and respect our promises to the Indian owners for whom these lands are held in trust. I conclude, then, that the Taylor Act does not conflict with the early cession acts and that the Taylor Act must be read ac-

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cording to the plain meaning of its terms. Therefore the income from these Indian ceded lands that have been incorporated in Taylor grazing districts must be distributed in the manner that the Taylor Act provides. A very different situation would be presented if at any time the Indians could show—what nobody has attempted to show in the present case—that including Indian ceded lands in a grazing district was injurious to the interests of the Indians or violative of the Federal Government's fiduciary obligations. Such a showing would be a proper ground for asking the exclusion of such Indian ceded lands from a grazing district. This would be perfectly consistent with the Taylor Act. Such a showing, however, would not justify a departure from the formula which the Taylor Act prescribes for the distribution of income after the lands have been included in a grazing district and after income has accrued from such lands.

It remains for me to consider only whether the conclusion that the Indians are entitled to only 50 percent of the proceeds of the ceded lands included within grazing districts must be altered in view of the temporary order of withdrawal of September 19, 1934, and the nature of the consent to the inclusion of these lands within the grazing districts. Of itself the order of withdrawal, as long as it remained in effect, undoubtedly would prevent the inclusion of the ceded Indian lands within a grazing district, and it would be immaterial that it was in anticipation of a future use or disposal (31 L. D. 193), or even that the purpose of the withdrawal order had ceased to exist (5 L. D. 432). In the present case, however, section 1 of the Taylor Grazing Act expressly contemplated that lands withdrawn for any purpose might be included in grazing districts "with the approval of the head of the department having jurisdiction thereof," and such consent was duly given. The order of withdrawal could therefore have no further operative effect in preventing use of the land for grazing purposes. Even if, however, the grazing use of the land were inconsistent with the purposes of the withdrawal, this could not affect the disposition of the proceeds. Once lands have been included within a grazing district, the provisions of the Taylor Act must come into play, and this expressly disposes of the proceeds of ceded Indian lands included within grazing districts in a particular way. The prior status of the lands would be immaterial. The statute cannot be read in such a way as to give the Secretary in effect a power to include land within a grazing district and yet suspend the operation of the act with respect to the disposition of proceeds. Similarly, while consent to the inclusion of the ceded lands within grazing districts was given upon the condition that

"the right, title and interest of the Indians in and to these lands shall in no way be jeopardized," there is no basis in the act for assuming that consent could be conditionally given, particularly in view of the fact that the act itself was designed to protect the interests of the Indians in the ceded Indian lands by continuing the applicable public land laws in operation with respect to such lands as were included within grazing districts. There was therefore no interest of the Indians that could be jeopardized by the disposition of the lands under the act, and the consent to the inclusion of these lands in grazing interests was complete and effective. The disposition of the resulting proceeds must therefore be carried out in accordance with the formula which the Taylor Act expressly provides.

A very different question is presented with respect to the disposition of income derived from isolated tracts leased under section 15 of the Taylor Act. These proceeds cannot be treated under section 11, since that provision relates only to the proceeds derived from ceded Indian lands included within a grazing district. There is no express reference in section 11 to Indian ceded lands leased as isolated tracts, and to apply a general statutory provision in such a way as to terminate a promised source of Indian income, as the General Land Office suggests, would seem not only confiscatory but a breach of the fiduciary obligations of the United States. The lands, while they have been treated as "vacant, unappropriated and unreserved lands of the public domain" within the meaning of section 15 of the Taylor Grazing Act (see letter of First Assistant Secretary to the Commissioner of the General Land Office, dated September 14, 1936), are nevertheless held by the United States as a trustee for the benefit of the Indians.² Only by the use of the clearest and

² While the determination of the question whether lands are to be deemed to be held in trust depends in each case upon the terms of the act of cession, it is well settled that when it is provided that the proceeds of ceded lands shall be held for the benefit of the Indians they are to be regarded as trust lands (*Chippewa Indians v. United States*, 305 U. S. 479; *Minnesota v. Hitchcock*, 185 U. S. 373; *Ash Sheep Company v. United States*, 252 U. S. 159). Such a provision is included in all four acts of cession applicable to the lands under consideration. The act of February 20, 1895 (28 Stat. 677), ceding certain of the lands of the Utes, and the act of February 20, 1893 (27 Stat. 469), ceding certain lands of the San Carlos Indians, contain, moreover, express declarations of trust. It is true that the acts of June 15, 1880 (21 Stat. 199), and February 20, 1895 (28 Stat. 677), ceding the Ute lands, contain a declaration to the effect that these lands should be deemed public lands or part of the public domain, but this did not deprive them of their trust character, nor indicate that they are not also to be deemed Indian lands. The purpose of such a declaration is merely to indicate that such lands are subject to disposal under the public lands laws (56 I. D. 330, 338). In this opinion of the Acting Solicitor of this Department the very Ute lands ceded under the act of June 15, 1880, were held to be trust lands; and as such subject to restoration to tribal ownership under the Indian Reorganization Act. In a memorandum dated August 27, 1938, the Solicitor of this Department held that the status of the Ute lands ceded under the act of February 20, 1895, was the same as that of the lands ceded under the act of June 15, 1880. There seems to

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most unmistakable language could Congress be deemed to have intended that the Indians should receive absolutely nothing from the use of these lands. I find no such language here.

Section 10 of the Taylor Grazing Act, as amended by the act of June 26, 1936 (49 Stat. 1976, 1978), in so far as relevant here, provides:

That, except as provided in sections 9 and 11 hereof, all moneys received under the authority of this Act shall be deposited in the Treasury of the United States as miscellaneous receipts, but 25 per centum of all moneys received *under this Act* during any fiscal year is hereby made available, when appropriated by the Congress, for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements, and 50 per centum of the money received under this Act during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which the grazing districts or the lands producing such moneys are situated. * * * [Italics supplied.]³

There is no express reference to ceded Indian lands, nor any express provision for the disposition of the proceeds of such lands, in either the original or the amended form of section 10. Section 9 applies only to voluntary contributions. Section 11 is expressly confined to Indian ceded lands included within grazing districts, and consequently cannot be applied to Indian ceded lands leased as isolated tracts under section 15 of the act. It is apparent from the scheme of the statute that Congress appreciated the distinction between lands included in a grazing district and lands leased as isolated tracts, and therefore the failure to make the same provision as in section 11 with respect to ceded Indian lands cannot be treated as an inadvertence.

In my opinion, section 10 of the Taylor Act and its amendment by the act of June 26, 1936, should be construed as inapplicable to Indian lands. As it originally stood, the first part of section 10 applied to public lands leased as isolated tracts as well as to lands included in grazing districts; since the proceeds were received "under the authority of this Act," and since they were not covered by the later exception of the proceeds from grazing districts, they would have to be covered into the Treasury as miscellaneous receipts. The amendment of section 10 merely altered the form of disposition of the proceeds

have been some difference of opinion concerning the character of the San Carlos lands ceded under the act of June 10, 1896. Indian Office File 134241-14 San Carlos 301 shows that at one time the Indian Office and the Department took the view that the agreement and ratifying act of 1896 completely extinguished the Indian title to the ceded lands. In a later memorandum dated February 7, 1934, however, the Solicitor of the Department disagreed with this view and came to the conclusion that the "cession made by the Indians in the agreement of 1896 was not made to the United States absolutely but in trust." All the Ute and San Carlos ceded lands must therefore be deemed to be trust lands.

³ As originally enacted (48 Stat. 1269, 1273), the italicized words were omitted and the phrase "from each grazing district" used instead.

of lands leased as isolated tracts to provide for the 25 and 50 percent distribution theretofore applicable only to the grazing district lands. As stated in the Committee report on the bill: "It is proposed to amend section 10 of the Taylor Act to provide that fees received from the leasing of individual tracts shall be disposed of in the same manner as fees received for permits within grazing districts." It is true that section 10 speaks broadly of "all moneys received." But neither the original nor the amendatory act expressly affected the interests of the Indians, and Congress gave no indication of having considered the proceeds of Indian lands leased as isolated tracts.

The situation, then, is that a technical and literal construction of section 10 might treat the proceeds of ceded Indian lands leased as isolated tracts as falling within the category of "moneys received under the authority of this Act" notwithstanding the fact that Congress did not expressly refer to these proceeds, that the United States was obliged to receive them as a trustee, and that when the problem of Indian ceded lands was considered, Congress made special provision (in section 11) for Indian participation in the disposition of "grazing district" proceeds. On the other hand, it may be argued with some force that the "moneys received under the authority of this Act" were only those which the United States was entitled to receive in its own right as a proprietor and not to those received only by reason of a trust relationship. This is essentially the view that was taken by the Attorney General in interpreting a statute granting the State of Kansas part of the proceeds of public land disposals within the State and holding that the State was not entitled to any part of the proceeds which the United States received, as a trustee for the original Indian owners, when it disposed of ceded Indian lands in the State of Kansas as "public lands." (19 Op. Atty. Gen. 117.)

As between the two competing interpretations of section 10, choice must be made in the light of the settled rule of construction that in the field of Indian legislation ambiguities are to be resolved in favor of the Indians. *Winters v. United States*, 207 U. S. 564, 576; *Choate v. Trapp*, 224 U. S. 665, 675; *United States v. Nice*, 241 U. S. 591, 599; *Carpenter v. Shaw*, 280 U. S. 363, 366. As the Court said in the *Nice* case, "legislation affecting the Indians is to be construed in their interest * * *." Applying this rule of construction, this Department has always held that when Indian lands ceded in trust have been subjected by Congress to a new form of disposal, the resulting proceeds go in their entirety to the Indians unless Congress has expressly provided otherwise, and this rule has been applied even when the statute authorizing the new form of disposal, contains a *general* clause governing the disposition of proceeds. *Christ C.*

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Prange and William C. Braasch, 48 L. D. 448; *Frank A. Kemp*, 47 L. D. 560; *Flathead Lands*, 48 L. D. 468. Indeed, this Department has ruled to the same effect even when the interests of Indians have not been involved. When the question was raised how the proceeds of lands withdrawn for reclamation purposes and leased as isolated tracts under section 15 of the Taylor Grazing Act should be disposed of, section 4, subsection I of the act of December 5, 1924 (43 Stat. 672, 703), specifically relating to reclamation lands rather than section 10 of the Taylor Grazing Act, was held applicable (see M. 29482, letter of First Assistant Secretary to Commissioner of the General Land Office, dated October 8, 1937).

Since the act as a whole contains no provision clearly disposing of the proceeds of ceded Indian lands leased as isolated tracts, such proceeds should go to the Indians in their entirety.

My conclusions are, therefore, as follows:

1. With respect to the lands included within grazing districts (a) that the Ute Indians are entitled to receive 50 percent of the proceeds of the lands ceded by them under the acts of June 15, 1880, and February 20, 1895, title to which has not been extinguished by the act of June 28, 1938; (b) that the San Carlos Indians are also entitled to receive 50 percent of the proceeds of the lands ceded by them under the acts of February 20, 1893, and June 10, 1896.

2. That the Ute and San Carlos Indians are entitled to all of the proceeds of the lands ceded by them under the foregoing acts which may have been leased as isolated tracts under section 15 of the Taylor Grazing Act.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

PROCUREMENT OF ENGINEERING SERVICES BY AGREEMENT WITH INDEPENDENT CONTRACTORS RATHER THAN BY EM- PLOYMENT OF PERSONNEL

Opinion, November 21, 1942

PERSONAL SERVICES—INDEPENDENT CONTRACTORS—CONDITIONS CONTROLLING THE PROCUREMENT OF ENGINEERING SERVICES BY AGREEMENTS WITH CONTRACTORS.

The Bureau of Mines may procure the performance of services by a firm of engineers, as independent contractors rather than as Government employees, upon a satisfactory showing of reasons why the services are not to be performed by its own personnel. Lack of time, space, special machinery, and trained personnel may be sufficient reasons for having the work performed by an independent contractor.

GARDNER, *Solicitor*:

My opinion has been asked, informally, whether the Bureau of Mines might enter into a contract with a certain firm of engineers for the performance of such services as the Bureau might wish, from time to time, to assign to it. A previous informal inquiry and my memoranda in reply thereto of September 3 and September 14 to the Director of the Bureau of Mines, dealt with the question of the proper appropriations to which to charge such services rather than the nature of the contract or the circumstances under which they might be procured. In order to cover the entire problem, and to clarify the application of my earlier memoranda in regard thereto, I deem it proper to give this formal opinion.

The Bureau of Mines may have overlooked the fact that many of the items of appropriation under which it is now operating contain express provisions for the employment of engineers or architects and firms and corporations thereof, by contract or otherwise, in so far as may be necessary to design and construct buildings, structures, pilot plants, or equipment that may be involved. If the particular employment contemplated can be brought within the terms of the express provision, there can be no question of the authority to procure the services by contract, and my opinion will apply only to instances where this is not the case.

The long-established general rule is that personal services may be procured only by appointment under the civil-service laws and regulations and at rates of compensation provided by the Classification Act. No reliable definition of the term "personal services" appears to have been formulated. It has never been contended, so far as I have discovered, that construction projects, involving the use of materials and supplies as well as of labor, cannot be performed by independent contractors rather than by the Government by its own employees. On the other hand, the performance of such services as are usually and customarily performed by Government employees within the departments, such as stenographic, clerical, and filing work—services not requiring special skills—is not permitted to be procured by contract. Between these two extremes of services that unquestionably may be procured by agreement with an independent contractor and those that certainly may not there lies a large territory, somewhere within which fall the services referred to by the Bureau of Mines.

The earlier rulings of the Comptroller General were quite strict, but in recent months, probably under the pressure of defense and war work, there has developed a greater use of the independent contractor. Projects which the Department concerned probably would have been

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required formerly to perform itself, are now let to contractors without objection. This may be illustrated by specific cases.

It has always been held by the Comptroller General that, in the absence of special legislation to the contrary, architects and engineers for construction projects could be employed only by appointment under civil service, and at rates of pay provided by the Classification Act. In connection with the construction of Coolidge Dam the Department of the Interior wished to employ engineers to constitute a board of consulting engineers, by means of a contract for their services, and without reference to civil-service requirements. The Comptroller General held that this could not be done.¹ He said:

* * * Contracts for personal services exclusively, in connection with a specific Government project, such as that here involved, may not be entered into on the basis of a flat rate for the project * * *. A flat rate for a specific job is applicable only for what is termed nonpersonal services necessitating the furnishing of both personal services and materials or supplies to complete the work; as, for instance, specific jobs of alterations or repairs, such as may be procured by contract after advertising and open competition. This form of contract, however, may not be used for employment of personal services where no material or supplies are necessary to be furnished, but there must be fixed a specific rate of compensation for the time actually served.

Similarly, although the act authorizing the construction of the Arlington Memorial Bridge provided that the commission could employ engineers and architects without reference to civil-service requirements and at rates of pay authorized by the commission, the Comptroller General ruled that this was not sufficient to authorize their employment as independent contractors.² The commission found it necessary to obtain a special act of Congress to enable it to employ engineers and architects in any manner and on any basis that it saw fit.³ In two later cases⁴ the Comptroller General ruled that in the absence of express statutory authority, architects may be employed only in accordance with civil-service requirements and at rates of compensation authorized by the Classification Act.

It is, no doubt, in consequence of these decisions that wherever construction is involved in the appropriation for the Bureau of Mines for the fiscal year ending June 30, 1943,⁵ an express provision is inserted to permit the employment of engineers and architects by contract. The standard provision reads as follows:

¹ 5 Comp. Gen. 231.

² 5 Comp. Gen. 450.

³ 67 Cong. Rec. 7543, 7662.

⁴ 6 Comp. Gen. 134; 17 Comp. Gen. 1114.

⁵ 56 Stat. 506.

* * * including the engagement by contract or otherwise, at such rates of compensation as the Secretary of the Interior may determine, of engineers, architects, or firms or corporations thereof necessary to design and construct the buildings, structures, and equipment * * *

Whether, in the absence of such a provision, the Comptroller General would now permit the employment of architects and engineers for construction projects by contract, can only be surmised. Apparently, all recent construction has been under express provisions permitting such contracts; at least no decisions later than those here cited have been found. However, analogous decisions as to other sorts of employment seem to indicate that, even in the absence of such express provisions, the Comptroller General would not now object to the employment of an architect for a construction project by contract.

The Treasury Department was recently under the necessity of compiling a list of all automobile owners in the United States and of mailing an application form to each one. In a request to the Comptroller General⁶ for a decision, that Department estimated that the proposed contract price for doing the work was less than the cost of undertaking the work itself, and expressed doubt if it could accomplish the task as quickly as need be. The Comptroller General ruled that the work could be let by contract. The decision apparently is that if it be administratively determined that procurement by contract rather than by use of Government personnel is the most economical and expeditious means of accomplishing the work, it may be done in this way. This decision greatly broadened the scope of possible procurement of services by contract, and other departments were not slow in seeking for themselves the benefit.

The Alien Registration Division of the Immigration and Naturalization Service of the Department of Justice, under the Alien Registration Act of 1940, was under the necessity of punching into five million cards the codes indicating certain tabulated information. It represented to the Comptroller General that it had neither the personnel, the mechanical equipment, nor the space for doing the work. The Comptroller General⁷ authorized the letting of the work by contract. The holding seems to be that if there is nothing in the applicable statutes raising an inference that the work is to be done by the Department concerned, by its own employees, and it is impractical or impossible to do it in this way, it may be done by contract. The latest pronouncement of the Comptroller General⁸ arose out of a

⁶ 21 Comp. Gen. 388.

⁷ 21 Comp. Gen. 400.

⁸ 21 Comp. Gen. 488.

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request by the War Department for a determination in regard to the performance of certain clerical and office work which it wished to let to contractors. Two of the projects were to be done by the contractor in its own quarters, on machines which it would furnish, by personnel trained in their operation. The third project contemplated that the contractor would perform the required services in Government space but with his own personnel, special machinery and special training not being involved. The War Department represented it had neither the space, machinery, nor personnel to perform the first two, but made no satisfactory showing as to why it should not perform the third itself. The Comptroller General ruled that the first two projects could be let to contractors, but that the Department should perform the third itself. The decision takes the view that a Government Department may procure the performance of personal services by an independent contractor upon a satisfactory showing of reasons why the services are not to be performed by its own personnel. Lack of space, special machinery, and trained personnel may be considered sufficient reasons for having the work performed under contract.

Inasmuch as the Bureau of Mines does not, at this time, have in mind any particular project which it may wish to submit to the firm of engineers for its bid or for the negotiation of a contract, I cannot attempt to give specific application to these principles and rules. It might be useful, however, to state the maximum requirements within which it appears that the Bureau of Mines would have to bring any particular project which it wished to have performed by an independent contractor. If all of the following conditions exist, it seems unlikely that the Comptroller General would object to a contract for the performance of the services.

1. The controlling statutes do not state nor raise a necessary inference that the work shall be done by Government personnel.

2. The work requires the use of special machinery or equipment or specially trained personnel which is lacking in the Bureau of Mines.

3. The work cannot be as conveniently nor as economically performed by the Bureau of Mines.

4. The work is not to be done upon Government premises nor with Government machinery or equipment.

5. The work is not of a sort that is customarily performed by the Bureau of Mines with its own personnel.

6. The performance of the work is urgently needed, and it can be more expeditiously performed by the proposed contractor than by the Bureau of Mines.

It may be that all of the six suggested elements need not be present in order for the proposed contract to be acceptable. Possibly even with all six elements available to rely upon, yet some further element not now foreseen nor suggested would militate against approval of the contract. If a specific case arises for my determination concerning which there is any doubt, I would be inclined to submit it to the Comptroller General for a decision in advance, as was done in most of the decisions herein cited. Any such contract submitted to the Solicitor for his opinion thereon should be accompanied by a memorandum setting forth the justification for the contract, as indicated in the statement of conditions above.

In conclusion, my opinion is that the Bureau of Mines may procure the performance of services by a firm of engineers, as independent contractors rather than as Government employees, upon a satisfactory showing of reasons why the services are not to be performed by its own personnel. Lack of time, space, special machinery, and trained personnel may be sufficient reasons for having the work performed by an independent contractor.

Approved:

OSCAR L. CHAPMAN,

Assistant Secretary.

CONVEYANCE OF TRIBAL LANDS TO INDIVIDUAL MEMBERS OF COLVILLE INDIAN RESERVATION

Opinion, November 21, 1942

INDIAN LANDS—CONVEYANCE—POWER OF TRIBE—REGULATION OF USE AND OCCUPANCY IN CREATION OF VESTED RIGHTS.

The power, inherent in the tribe, to provide for the orderly distribution of the use and occupancy of tribal lands, does not, in view of the inhibitions of 25 U. S. C. sec. 177, extend to the creation of vested enforceable interests in the individual members of the tribe.

Since such a vested enforceable interest would be created by a conveyance for a consideration by the tribe to an individual member of possessory title in tribal lands with the right to transmit that title by descent, devise, or conveyance *inter vivos*, such a conveyance may not be made in the absence of clear congressional authority therefor.

GARDNER, *Solicitor*:

I am in receipt of your [Secretary of the Interior] letter of March 6 requesting an opinion on the question whether there is sufficient existing authority to carry out a proposed program of land conveying on the Colville Indian Reservation which would have the following features:

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1. "A conditional sale of a right of exclusive use of tribal land, together with improvements thereon to individual Indians regularly enrolled on the Colville Reservation."

2. The consummation of such sales "through the medium of a 'tribal homestead deed' to be designed, which would recite that the lands and improvements so purchased are held in trust for the tribe for the exclusive use and occupancy by the Indian purchaser during his lifetime" with the right "to designate by will whom he wishes to acquire his interest in the purchased property."

3. The "tribal homestead deed" would also recite that "the lands covered therein are not subject to alienation to whites or to Indians not regularly enrolled on the Colville Reservation, but that the Indian purchaser from the tribe may reconvey the property to some other regularly enrolled Colville Indian with the consent of the tribal council."

4. All such "tribal homestead deeds" are to be "approved by the Tribal Council and the Commissioner of Indian Affairs."

The correspondence indicates that this plan has been devised because the Colville Tribe is dissatisfied with the existing system of making land-use assignments to members of the tribe, and desires some more permanent and secure form of tenure. The Indian Office has taken the position that while it would be opposed to any form of conveyance which would contemplate "the ultimate acquisition of title," it might consider the alternative plan that has been outlined.

The lands to which the proposal relate are of two types: surplus unallotted lands within the Colville Indian Reservation as created by Executive order of April 9, 1872 (Kappler, *Indian Affairs, Laws and Treaties*, vol. 1, p. 916), and lands purchased for the tribe with tribal funds appropriated by the Deficiency Appropriation Act of 1939 (53 Stat. 1301, 1314), and reappropriated by the act of June 28, 1941 (55 Stat. 303, 313). Title to the lands purchased under the cited acts is taken by the United States in trust for the tribe. Both classes of land are subject to allotment in severalty to the individual members of the tribe in conformity with the General Allotment Act of February 8, 1887 (24 Stat. 388, 25 U. S. C. secs. 331, 332, 348), as amended. The authority to allot the reservation land is found in the act of March 22, 1906 (34 Stat. 80), as amended by section 30 of the act of June 25, 1910 (36 Stat. 855, 863). Authority to allot the purchased lands is found in the act of February 14, 1923 (42 Stat. 1246, 25 U. S. C. sec. 335). These statutes, which prescribe with particularity the allotment procedure and provide for an absolute transfer of the tribal title to the individual allottees in trust with the promise to convey the fee at the end of

a prescribed period, obviously confer no authority for the plan of land conveyancing now proposed.

No statutory provision specifically authorizing the proposed plan has been found. The authority, if it exists at all, must stem from the power, inherent in the tribe itself, to provide for the orderly distribution of the use and occupancy of the tribal lands among the individual members of the tribe. In determining whether that power, the existence of which is not open to question,¹ extends to the present case, we are met at the outset with the inhibitions contained in section 177 of title 25 of the United States Code. That section reads:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution. * * *

The purpose of Congress in enacting the foregoing provision no doubt was to protect the Indian tribes against improvident alienation of their lands to non-Indians. But the language used is all-inclusive. It is immaterial, therefore, whether the forbidden transaction involves Indians or whites. It is likewise immaterial whether the particular transaction be one running from the tribe to its members or from the members to each other. If the tribe may not sell tribal land neither may the individual members sell tribal land or any interest therein. The inhibition of the statute has the same application to individual Indians that it has to Indian nations or tribes (18 Op. Atty. Gen. 486). The reason for this rule is that the individual Indian must be deemed "to be acting by authority from the tribe only" (*Jones v. Meehan*, 175 U. S. 1, and earlier authorities there cited). As stated in *Franklin v. Lynch*, 233 U. S. 271: "As the tribe could not sell, neither could the individual members, for they had neither an undivided interest in the tribal land nor vendible interest in any particular tract."

If, therefore, the plan of conveyancing proposed contemplates the "purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto," the transaction is without validity unless made in the prescribed manner. The mere fact that no absolute conveyance of the fee is intended is obviously not decisive. The attempted transfer of any title or claim to the tribal land is equally within the prohibition. In an opinion dated August 9, 1939 (57 I. D. 37), the Solicitor for this Department had occasion to consider a similar question arising under section 17 of the Pueblo Lands Board Act

¹ Cohen, *Handbook of Federal Indian Law*, pp. 143, 188.

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the provisions of which section are almost identical with 25 U. S. C. sec. 177. The particular question considered by the Solicitor was whether the statute applied to an assignment of land from a pueblo to one of its members. The Solicitor ruled that the test to be applied was whether the assignment conveyed an interest in the land. He stated:

The language of this act is broad enough to cover even an assignment of land from a pueblo to one of its members, if such assignment amounts to a transfer of right, title, or interest in real property. Any such assignment, made by the pueblo without the prior approval of the Secretary of the Interior, would be, according to the statute, without validity in law or equity. On the other hand, if an assignment does not convey an interest in the land itself, it does not fall within the scope of the statute cited. It becomes important therefore to distinguish between those transactions which convey an interest in real property and those transactions which, while relating to the use of real property, do not create an interest therein. [P. 49.]

Applying a similar test here, the conclusion that the transaction is in violation of the statute is inescapable. The interest sought to be established in the individual is much more than the bare right of occupancy. For a consideration, it is proposed to convey to the individual Indian a full and complete possessory title with a right to transmit that title by descent or to alienate it by will or by conveyance *inter vivos*, to other members of the tribe. The element of purchase plus the incidents of descent and alienation stamp the transaction as one designed to individualize the tribal title and create in the individual an enforceable vested interest. Even if it be conceded that such a grant would not be indefeasible so far as the tribe itself is concerned and that the tribe nevertheless retains the power to revoke the grant, this would not preclude the applicability of 25 U. S. C. sec. 177. The whole plan in fact involves an inescapable dilemma. If a mere assignment is contemplated, the goal of security is impossible of achievement. If, on the other hand, a valid "title" or "claim" is created, it must encounter the prohibition of the statute.

My conclusion is that there is not sufficient existing authority to carry into effect the proposed plan of conveyancing. In any event, the matter is so doubtful as to render the adoption of the plan unwise in the absence of clear congressional authority.

Approved:

OSCAR L. CHAPMAN,

Assistant Secretary.

**CONSTITUTIONALITY OF LEGISLATION LIMITING THE USE OF
APPROPRIATED FUNDS DURING SERVICE OF A DESIGNATED
EXECUTIVE OFFICER**

Opinion, November 23, 1942

**PUERTO RICO—PROVISO IN APPROPRIATION ACT LIMITING USE OF FUNDS DURING
SERVICE OF PRESENT GOVERNOR—CONSTITUTIONAL LIMITATIONS ON LEGISLA-
TIVE POWER.**

The proviso in H. R. 7505, 77th Cong., 2d sess., that no funds appropriated pursuant to the act shall become available at any time "during the service of the present Governor" of Puerto Rico is unconstitutional because (1) it constitutes an encroachment upon executive power, (2) it is a bill of attainder, and (3) it violates due process.

GARDNER, *Solicitor*:

On August 27, H. R. 7505 was introduced and referred to the Committee on Agriculture. It authorizes the appropriation of \$15,000,000 to be administered by the Secretary of Agriculture "for the only purpose of encouraging and increasing the production and distribution of food and feed products for home consumption in Puerto Rico and the Virgin Islands." On November 19, the bill was reported favorably. The only amendment made by the Committee was the addition of the following paragraph:

Any appropriation made pursuant to this Act shall be conditioned that the funds shall not become available at any time during the service of the present Governor of Puerto Rico. [H. Rept. 2641, 77th Cong., 2d sess.]

The Committee report offers no explanation of the amendment. If enacted, H. R. 7505 would have the effect of making any appropriation for the authorized purposes subject to a point of order unless the appropriation bill contained a similar limitation. I shall treat it, therefore, as a limitation upon an appropriation.

This condition upon the appropriation of moneys for the relief of the people of Puerto Rico is plainly unconstitutional. The conclusion is compelled by the basic constitutional principle of separation of powers and is bulwarked by the constitutional prohibitions against legislative punishment of individuals.

1. The Constitution provides, in Article II, that "the executive Power shall be vested in a President of the United States of America" (sec. 1) and that "he shall take Care that the Laws be faithfully executed" (sec. 3).

The removal of officers in the executive branch of the Government is an executive not a legislative function.

Indeed, in the Nation's First Congress, many of whose members had been members of the Constitutional Convention, there was elimi-

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nated from the bill creating the State Department a phrase declaring that the President could remove the principal officer of the Department. This was done, after very full debate in the House, because the Congress did not wish to imply that the executive power to remove officers was granted by the legislature. Act of July 27, 1789 (1 Stat. 28); 1 Annals of Congress 576, 578-579, 585, 591. James Madison, in urging this action, stated the principle clearly (1 Annals of Congress 604):

If there is a principle in our Constitution, indeed in any free Constitution, more sacred than another, it is that which separates the Legislative, Executive, and Judicial powers. If there is any point in which the separation of the Legislative and Executive powers ought to be maintained with greater caution, it is that which relates to officers and offices.

The Supreme Court as early as 1839 upheld this view. In *Ex parte Hennen*, 13 Pet. 230, 259, it said that it had—

* * * become the settled and well understood construction of the Constitution, that the power of removal was vested in the President alone, in such cases; although the appointment of the officer was by the President and Senate.

The early opinions of the Attorneys General were to the same effect. See 4 Op. Atty. Gen. 1; 4 Op. Atty. Gen. 603; 5 Op. Atty. Gen. 288, 290; 6 Op. Atty. Gen. 4.

Some questions relating to the removal power were not finally settled until recent years. It has been recognized that Congress can prescribe *general* rules for the appointment and removal of "inferior officers." *United States v. Perkins*, 116 U. S. 483. This reflects the provision of Article II of the Constitution that "Congress may by law vest the appointment of such inferior officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments." But in 1926 the Supreme Court held that Congress could not even by general rules limit the President's power of removal of executive officers appointed with the consent of the Senate. *Myers v. United States*, 272 U. S. 52. In 1935, in *Humphrey's Executor v. United States*, 295 U. S. 602, the Court held that such general limitations could be imposed upon the removal of officers who had legislative or judicial duties to perform, and who were not "purely executive."¹

These cases were concerned merely with the power of the Congress to limit the executive power of removal. It is entirely clear that the Congress has no power to direct or require the removal of any officer

¹ Neither the *Perkins* nor the *Humphrey's* case applies to the Governor of Puerto Rico, since he is appointed with the consent of the Senate and since his duties are purely executive.

in the executive branch. Chief Justice Taft, writing for the Court in *Myers v. United States*, said (272 U. S. at 122) :

* * * in the nature of things the defects in ability or intelligence or loyalty in the administration of the laws of one who has served as an officer under the President, are facts as to which the President, or his trusted subordinates, must be better informed than the Senate, and the power to remove him may, therefore, be regarded as confined, for very sound and practical reasons, to the governmental authority which has administrative control. The power of removal is incident to the power of appointment, not to the power of advising and consenting to appointment, and when the grant of the executive power is enforced by the express mandate to take care that the laws be faithfully executed, it emphasizes the necessity for including within the executive power as conferred the exclusive power of removal.

After explaining that the *Perkins* case dealt with the exception of "inferior officers," the Chief Justice added (272 U. S. at 161) :

* * * But the Court never has held, nor reasonably could hold, although it is argued to the contrary on behalf of the appellant, that the excepting clause enables Congress to draw to itself, or to either branch of it, the power to remove or the right to participate in the exercise of that power. To do this would be to go beyond the words and implications of that clause and to infringe the constitutional principle of the separation of governmental powers.

Humphrey's case, in limiting the *Myers* decision to purely executive officers, strengthened rather than limited the decision of Chief Justice Taft so far as it stated that the legislative branch could not require the removal of executive officers of any nature. Justice Sutherland in *Humphrey's* case said (295 U. S. at 629-630) :

* * * three general departments of government entirely free from the control or coercive influence, direct or indirect, of either of the others, has often been stressed and is hardly open to serious question. So much is implied in the very fact of the separation of the powers of these departments by the Constitution; and in the rule which recognizes their essential co-equality. The sound application of a principle that makes one master in his own house precludes him from imposing his control in the house of another who is master there. * * *

It is then, entirely clear, that the Constitution in separating the executive and legislative powers of the Government, forbids a legislative removal of an executive officer.²

2. Even if there were some legislative power to require the removal of executive officers generally, it could not constitutionally be exercised in this manner. The constitutional prohibition against bills of attainder (sec. 9 of Article I) and the requirements of elementary fair play found in the due process clause (Amend. V) unite to condemn legislation such as here proposed.

² The text writers unanimously agree. Rottschaefer, *Constitutional Law* (1939) p. 408; Willoughby, *Constitutional Law* (1929), III, pp. 1510, 1512, 1524; Corwin, *The President* (1940), p. 95; Cushman, *The Independent Regulatory Commissions* (1941), p. 675.

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In *Cummings v. Missouri*, 4 Wall. 277, 323, the Supreme Court gave the classic definition of the bill of attainder which is prohibited by the Constitution. It said:

A bill of attainder is a legislative act which inflicts punishment without a judicial trial.

If the punishment be less than death, the act is termed a bill of pains and penalties. Within the meaning of the Constitution, bills of attainder include bills of pains and penalties: In these cases the legislative body, in addition to its legitimate functions, exercises the powers and office of judge; it assumes, in the language of the text-books, judicial magistracy; it pronounces upon the guilt of the party, without any of the forms or safeguards of trial; it determines the sufficiency of the proofs produced, whether conformable to the rules of evidence or otherwise; and it fixes the degree of punishment in accordance with its own notions of the enormity of the offence.

The Court held the Missouri law to be an unconstitutional bill of attainder because it forbade holding public office, serving as a corporate officer, or as trustee, or teaching unless an oath were taken that the affiant had never been hostile to the United States. In *Ex parte Garland*, 4 Wall. 333, 377, the Court similarly condemned Federal legislation making such an oath a condition to practice before the Federal courts. These decisions apply with doubled force to the proposed bill, which is directed at a specific individual, presumably because the Committee thinks there has been some undefined offense or course of conduct which has occurred in the past.

Much the same constitutional prohibition is found, so far as concerns legislation of this sort, in the due process clause of the Fifth Amendment. It is true that H. R. 7505 does not seek to imprison the Governor of Puerto Rico or to seize his property. But it is not to be supposed that the great guarantees of the Constitution against unfair legislative action are meaningless so long as the bill is directed only at a man's honor and his continuance in office. "The Constitution deals with substance, not shadows." (*Cummings v. Missouri*, 4 Wall. at 325.) If a man may not constitutionally be subjected to a small fine without knowing the charge against him and without an opportunity to be heard, much less can he constitutionally be ousted from official position by legislative action based upon unknown grounds, and consummated without notice to the accused or opportunity to be heard in his own defense.

3. H. R. 7505, it is true, does not in terms undertake to oust from office the Governor of Puerto Rico. But its condition, that no part of the authorized appropriation is to be spent "during the service of the present Governor" is obviously directed to the same end. Its constitutionality is not saved because the vehicle for the legislative

removal is to be an appropriation act rather than substantive legislation.

If the Congress is constitutionally forbidden directly to remove an officer of the executive branch, it is not to be thought that it can accomplish the same thing if a measure of indirection is added. The Constitution provides an elaborate machinery for the legislative removal of judicial and executive officers, that of impeachment (Art. I, secs. 2, 3). The framers of the Constitution contrived many safeguards for the removal process, including impeachment by the House, trial by the Senate on oath or affirmation, and conviction only on two-thirds vote. It is impossible that they would have supposed the same result could be reached by the simple expedient of adding a rider to an appropriation bill.

The question has been squarely presented, so far as I have found, in only one case. In *Tolerton v. Gordon*, 236 Mo. 142 (1911), the Supreme Court of Missouri held unconstitutional a proviso to an appropriation act which read:

* * * Provided, that none of the money herein appropriated in this section shall be available or paid so long as the present State Game and Fish Commissioner remains in this office or is in any wise connected with the office of State Game and Fish Commissioner, except the salaries and accounts due at the time of the approval of this act.

While the court relied upon the State constitutional prohibition against "special legislation," it left no doubt what its decision would have been under other constitutional prohibitions. It said (236 Mo. at 161-162):

* * * In singling out relator from the class of persons eligible to hold that office and in making the proviso apply to and exclude him only, by imposing on him a burden not imposed on any other person, the proviso became special legislation in the most pronounced form. If the Legislature may by a proviso render an appropriation unavailable so long as the relator remains in the office referred to, it necessarily follows that it may also make it unavailable, so long as any person of the same political party affiliations as the relator remains in or may be connected with that office. * * *

The United States Senate, at this very session, has reached the same conclusion. The Independent Offices Appropriation Act for 1943, as it reached the Senate Floor contained the proviso—

Provided, That no part of any appropriation contained in this act shall be used to pay the compensation of Goodwin Watson.

Six Senators took the floor to demand the elimination of the proviso. They objected that the clause was unconstitutional because it amounted to a bill of attainder,³ because it was a legislative inter-

³ Sen. Murdock, 88 Cong. Rec., p. 4000 (May 6, 1942).

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ference with the executive function,⁴ and because it deprived Mr. Watson of his office without a trial or hearing;⁵ it was also opposed as, for these reasons, reflecting thoroughly bad legislative policy.⁶ Even the one Senator who undertook to explain the reasons for the provision said that conditioning an appropriation bill upon the removal of an employee "is not a desirable procedure."⁷ The provision was eliminated on a voice vote⁸ and was never restored.

The position of the Senate would apply with redoubled force here. Watson at least knew the objections which had been raised against him; the Governor of Puerto Rico is not informed, either by H. R. 7505 or by the accompanying report, as to the cause for the amendment. Watson appeared before a Congressional Committee to defend himself; the Agriculture Committee has acted without hearing the Governor. The penalty proposed last spring operated only against Watson; here the Committee undertakes to penalize the two million residents of Puerto Rico because it does not like their duly appointed Governor.

No principle of our law is more cherished than that which ensures that no man shall be condemned without a fair trial. No principle of our form of government is more basic than that which ensures that neither the legislature nor the executive shall control the functions of the other. H. R. 7505 in its present form violates both principles. It is, in my opinion, unconstitutional.

J. A. ALLISON AND MARK L. JOHNSON, SELECTORS, BY TED E. COLLINS, SUBSTITUTE ATTORNEY IN FACT

*Decided December 4, 1942**Motion for Rehearing decided August 21, 1943*

FOREST LIEU SELECTIONS—EXCHANGE OF LANDS UNDER THE ACTS OF JUNE 4, 1897; JUNE 6, 1900; MARCH 3, 1905; AND SECTION 7 OF THE TAYLOR GRAZING ACT OF JUNE 28, 1934; AS AMENDED BY THE ACT OF JUNE 26, 1936—TIMBER CONSERVATION POLICY—LIMITATIONS ON OUTSTANDING SUBSTITUTE SELECTION RIGHTS.

THE ACT OF JUNE 4, 1897, A RELIEF ACT—ABUSED BY TIMBER AND LAND SPECULATORS—TIMBER FRAUDS—CONSERVATION NEEDS AND POLICIES—REPEAL ACT OF MARCH 3, 1905—ITS SAVING PROVISION.

The act of June 4, 1897, though designed to relieve settlers, entrymen and patentees of lands within national forest reserves by permitting exchange

⁴ Sen. Barkley, *id.*, pp. 3997-3998.

⁵ Sen. Danaher, *id.*, p. 4001; Sen. Hill, *id.*, p. 4001; Sen. Mead, *id.*, pp. 4003-4004.

⁶ Sen. Taft, *id.*, pp. 3997-3998; Sen. Hill, *id.*, p. 4001.

⁷ Sen. McKellar, *id.*, p. 4002.

⁸ *Id.*, p. 4003.

of such holdings for outside tracts, found its chief beneficiaries in timber and land speculators and opened the door to gross abuses and frauds in wholesale exchanges of denuded lands in forest reserves for the most heavily timbered lands outside. To end the abuses and to conserve the country's dwindling forest resources, the legislation providing for the exchange right was repealed by the act of March 3, 1905, entitled "An Act Prohibiting the selection of timber lands in lieu of lands in forest reserves." But a saving proviso permitted the completion of pending selections found valid and the making of other, or substitute, selections in the place of pending choices found invalid for reasons not the selector's fault. Applicants herein claim a right of such substitute selection under this proviso.

SOME LATER IMPLEMENTATION OF NATIONAL CONSERVATION POLICIES—TAYLOR GRAZING ACT, SECTION 7, AND EXECUTIVE ORDERS OF GENERAL WITHDRAWAL—LANDS RESERVED FOR CLASSIFICATION IN AID OF CONSERVATION AND DEVELOPMENT OF NATURAL RESOURCES—SECRETARY'S AUTHORITY TO RESTORE LANDS FOR DISPOSAL OR TO REFUSE CLASSIFICATIONS INCOMPATIBLE WITH THE PURPOSES OF THE WITHDRAWALS.

Various phases of conservation policy later found new implementation in the Taylor Grazing Act of June 28, 1934, and the Executive orders of November 26, 1934, and February 5, 1935. These effected withdrawal of the public lands in 24 States, reserving them for classification, for determination of their highest usefulness and for conservation and development of natural resources. But section 7 of the amending act of June 26, 1936, gave to the Secretary discretionary authority to restore to the public domain for disposal such withdrawn lands as in his opinion meet the prescribed tests and those applicable in the interest of the people and of conservation of natural resources. *Held*: Lands selected for satisfaction of an outstanding substitute forest lieu selection right must meet the requirements under section 7.

CHARACTER OF LANDS SUBJECT TO SUBSTITUTE SELECTION UNDER THE REPEALER'S PROVISIO AND UNDER SECTION 7.

Where a right to make a substitute selection exists under the saving clause of the repealer, the lands selected must meet the requirements of the legislation providing for the right, namely, the act of June 4, 1897, as amended by the act of June 6, 1900, as well as the requirements of section 7 of the Taylor Act. *Held*: 1. That lands selected in satisfaction of an outstanding substitute selection right must be "vacant surveyed nonmineral public lands which are subject to homestead entry * * *" and "proper for acquisition in satisfaction of any outstanding * * * exchange * * * rights * * *". 2. That lands which are essentially forest lands, unfit for grazing, and so mountainous, rough, rocky and steep that even if cleared of their timber they would be unfit for agriculture and impossible of cultivation cannot be classified as suited or subject to homestead entry. 3. That forest lands which have a value for conservation and also a substantial value for their timber, which are sought only for their timber and the disposal of which might mean immediate liquidation of their portion of this exhaustible natural resource are affected by a public interest and the Secretary has no authority to restore them to the public domain for a disposal in derogation of the purposes of the withdrawal. 4. That the lands here selected, not being subject to homestead entry and being

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affected by a paramount public interest, cannot be classified as proper for acquisition in satisfaction of an outstanding substitute selection right and cannot be restored to the public domain for disposal as such public lands.

5. That an isolated tract may not be released for a use contrary to the public interest.

TITLE OF THE REPEALING ACT—EFFECT ON CHARACTER OF LAND SUBJECT TO SUBSTITUTE SELECTION.

The repealing act of March 3, 1905, is entitled "An Act Prohibiting the selection of timber lands in lieu of lands in forest reserves" but the saving clause is silent as to the character of lands subject to the substitute selection permitted. Whether the title places an additional limitation on the substitute selection, restricting it to lands wholly without timber, is not here decided.

LANDS SUBJECT TO HOMESTEAD ENTRY—MEANING OF TERM IN LAND DEPARTMENT PRACTICE AND IN ACT OF JUNE 6, 1900.

Land department practice has regarded the use of lands for farming or for agriculture in the broad sense as satisfying the cultivation requirement of the homestead law but has not permitted homestead entry of lands incapable of being rendered cultivable or usable for such farming, for example, lands valuable only for their timber. *Held*: That in the act of June 6, 1900, the Congress used the term "subject to homestead entry" in the same way as the land department.

SECRETARY'S DISCRETION—CHARACTER—LIMITATIONS—STATUTORY RULES—PUBLIC INTEREST.

Despite wide powers in his supervisory capacity and large discretion under section 7 of the Taylor Act the Secretary is bound by the applicable statutes and may not substitute for their conditions and the public interest *ad hoc* criteria of his own or an applicant's choosing.

A VALID RIGHT OF SUBSTITUTE SELECTION RECOGNIZED AS A PROPERTY RIGHT—WHEN TO BE SATISFIED.

The Department recognizes a valid right of selection or of substitute selection as a property right and will permit its satisfaction when the reason for the exchange continues to exist and when the proper parties comply with the requirements. To refuse approval of a particular selection because it does not meet the legal requirements is neither to repudiate nor to destroy the right. There are no equities to be considered when a selector, disregarding the rules, fails to perform the selection requirements within the period reasonable in the circumstances of his case.

TREATMENT OF RIGHT AS SCRIP RISKS DEFEAT BY INTERIM CHANGES—LACHES—NO CLAIM AGAINST GOVERNMENT.

One treating a right of substitute selection as scrip and delaying its exercise will not be heard to complain if his right is defeated by interim changes in forest reserve boundaries or in the governing law. Nor will one failing to apply for restoration of his relinquished base be heard to urge that Government possession of the title for 40 years places any obligation on the Government to grant a particular substitute selection.

CHAPMAN, *Assistant Secretary*:

This is an appeal from a decision made by the Acting Assistant Commissioner of the General Land Office on December 19, 1940, rejecting an application for a forest lieu selection under the acts of June 4, 1897 (30 Stat. 36), June 6, 1900 (31 Stat. 614), and March 3, 1905 (33 Stat. 1264). The application was filed on May 3, 1939, by Ted E. Collins as substitute attorney in fact for J. A. Allison and Mark L. Johnson, the latter as trustee of the estate of Robert R. Selway. With it was a petition for the classification of the land under section 7 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1272), as amended by the act of June 26, 1936 (49 Stat. 1976, 43 U. S. C. 315f).

The application has been made to satisfy a right of reselection accruing under the proviso of the act of March 3, 1905 (33 Stat. 1264). The original selection, No. 2826, Sundance 04956, filed July 30, 1900, and still pending on March 3, 1905, was canceled on June 29, 1920, because the parties in interest had failed to file a coal waiver. By decision of August 8, 1930, promulgated by letter of August 29, 1930,¹ the Department held that this cancelation was not the fault of the selector, F. A. Hyde and Company, and allowed J. A. Allison and Mark L. Johnson, trustee of Robert R. Selway, the transferees of the selected lands, to make reselection in their own names.

On September 2, 1930, and October 10, 1930, Allison and Johnson, respectively, executed powers of attorney appointing Jeremiah Collins to exercise the right of reselection and to appoint substitute attorneys. On December 26, 1930, Jeremiah Collins executed a similar power appointing Ed Leigh McMillan of Brewton, Alabama, his attorney in the premises; and on April 1, 1939, said McMillan executed a similar power appointing Ted E. Collins his substitute to select.

On May 3, 1939, Ted E. Collins filed the instant application, seeking to exchange 80 acres of base land within the Sierra National Forest in T. 16 S., R. 31 E., M. D. M., *California*, Sec. 36, E $\frac{1}{2}$ SW $\frac{1}{4}$, for 80 acres in Idaho in T. 40 N., R. 3 E., B. M., *Idaho*, Sec. 4, SE $\frac{1}{4}$ SW $\frac{1}{4}$, Sec. 25, SE $\frac{1}{4}$ NE $\frac{1}{4}$.

Appellant's petition for classification was as follows:

There are a few small creeks fed by springs on the land herein applied for, but the same have no value for agricultural or grazing purposes because the land is nonagricultural, a steep hill side near the top of a divide; and contains a growth of white pine, larch, red fir, white fir and cedar timber; and because of the heavy growth of timber it never has been used for grazing or agricultural purposes and is not suitable for such purposes; in fact it is chiefly

¹Sundance 04956, A. 14957.

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valuable for timber and title to the land is sought for this purpose. There are no improvements of any kind on said land. The land is not now and never has been occupied by any person.

No part of said land is irrigated or under constructed or proposed irrigation ditches or canals; said land, because of its mountainous character, cannot be irrigated at a reasonable cost or to profitable advantage.

The application accompanying this affidavit is being made for and on behalf of the Potlatch Forests, Inc., of Lewiston, Idaho, who is now the owner of all contiguous lands² adjoining that therein applied for, which are valuable for timber, and title to this land is sought in connection with the regular timber operations of said company.

According to the decision of the General Land Office, the Division of Investigations reported these tracts to be steep, timbered lands high up on divides in the Clearwater River watershed, rough, brushy and unfit for grazing; with no indications of salines, coals or other minerals; and a cruise by Potlatch Forests, Inc., which is interested in nearby lands, had estimated the tracts to contain 300,000 feet of white pine and 575,000 feet of mixed cedar, fir and larch. The decision also stated that the State Forester at Boise, Idaho, was recommending the State's lieu selection of these lands for incorporation of them in the proposed State forest in this area. In all the circumstances, the Commissioner, without further specification, considered the application contrary to the public interest and on December 19, 1940, held it for rejection, subject to the usual right of appeal.

On January 27, 1941, within the appeal period, applicant filed an appeal. He also stated that within a short period brief and argument supported by affidavits would be filed in support of the appeal. But no such papers have been received. Appellant specified as error—

1. That the Commissioner erred in not reclassifying the land applied for under Section 7 of the Act of June 28, 1934 (48 Stat. 1269), as amended by the Act of June 26, 1936 (49 Stat. 1976), and holding that the acquisition of said land by the selector in the interest of the Potlatch Forests, Inc., "would not be in the public interest."
2. It was error not to give due consideration to the fact that the tracts applied for under this application are isolated and disconnected and even though they contain a considerable stand of timber, are of little use and value to any person other than the adjoining land owner.

On December 10, 1941, the Commissioner received from the State Forester of Idaho a letter dated December 6, 1941. This said that the State was not opposed to the application of May 3, 1939, for lieu selection of these lands; and, in effect, that the State's previous

² An inaccurate statement.

interest in these lands had ceased because of the failure of passage of a certain land exchange law upon which the State's interest had been based. In mentioning "the application of May 3, 1939," the State Forester was probably referring to the Collins application. His statements did not induce any change in the Commissioner's decision.

The Department does not find in the specifications of error, the first of which is too general to be accepted under the Rules of Practice, or in the cessation of the State Forester's interest in these lands or in the two together any ground for disturbing the Commissioner's decision that to approve this selection would be contrary to the public interest.

The forest lieu legislation³ under which the right here in question originated was repealed in 1905 because it had not operated in the public interest. It had been designed to relieve actual settlers, entrymen and patentees whose lands had become or in future might become included within forest reserves by permitting such persons to exchange their imprisoned lands for tracts outside the reserves.⁴ But, as it transpired, the principal beneficiaries of the legislation were not those persons but were the owners of railroad and State school lands,⁵ who in most cases had purchased such lands for use as base in lieu selections. In practice therefore the lieu acts opened the door to wholesale exchanges of reserve lands which had been denuded of their timber and were therefore of comparatively little worth for the most heavily timbered and valuable Government lands situate anywhere outside the reserves. They also led to the notorious California and Oregon timberland frauds, which culminated in numerous convictions of both high and low.⁶

Exposure of the large-scale, systematic abuse of the lieu selection right demonstrated the urgent need for new policies and new measures for protection of the Nation's timber. There had been such improvident destruction of the forests in so many areas that the remaining timber supply must be husbanded to meet the growing demands of a developing country.⁷ The Congress first considered merely restricting the existing lieu right to nontimbered lands, then

³ Act of June 4, 1897 (30 Stat. 36); act of June 6, 1900 (31 Stat. 614); March 3, 1901 (31 Stat. 1037); March 3, 1905 (33 Stat. 1264).

⁴ F. A. Hyde, 28 L. D. 284, 288-9.

⁵ H. R. Report No. 445, Jan. 21, 1904, 58th Cong., 2d sess., accompanying H. R. 4866; and appending a Report of the Commissioner of the General Land Office to the Secretary.

⁶ See *Looters of the Public Domain* by S. A. D. Puter and Horace Stevens, Portland, Oregon, 1908, Portland Printing House Publishers.

⁷ See reports and recommendations by President Theodore Roosevelt's Public Lands Commission, submitted to the Senate on March 7, 1904, February 13 and March 2, 1905, Senate Document 189, 58th Congress, 3d session.

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decided to extinguish the right altogether. But it entitled its repeal act of March 3, 1905 (33 Stat. 1264), "An Act Prohibiting the selection of timber lands in lieu of lands in forest reserves."⁸ The repeal act protected contracts already made. Further, as to selections pending at repeal, it permitted patent of those later found valid, while in lieu of those later held invalid for no fault of the selector it permitted entirely new selections.

This saving clause as to new selections is not explicit as to the character of the lands to be reselected and raises some doubt as to whether it intended simply to continue the existing restrictions on the lieu right or to add to them an additional limitation restricting the reselection to nontimbered lands. Certainly to allow an offeree again to select timber lands would be to sanction the very practice which the repeal legislation was designed to end and prohibit. Moreover, it must be noted that the saving clause constitutes no new offer of exchange; and also that the title of the act looks to the future and must be without direct meaning unless it be construed to apply to the only selections permitted under the repeal, namely, new selections in lieu of those prior selections pending at repeal but later found invalid for no fault of the selector.

It is unnecessary however to argue this question now. For even if it be held that a reselection of timber lands was legalized by the terms of the 1905 act, for whatever reasons, in despite of the timber conservation policy motivating the repeal, such a reselection may lawfully be rejected today if found contrary to the present day conservation policy as implemented by the Taylor Grazing Act and the general withdrawal orders issued in aid of it.⁹

The Executive order of November 26, 1934, withdrew all public lands in Idaho and eleven other States from all forms of entry pending the Secretary's determination of their highest usefulness and reserved them for his classification of them in furtherance of conservation and development of natural resources and of the several specific purposes of the Taylor Grazing Act. Section 7 of that act

⁸ The act provided as follows: " * * * That the Acts of June fourth, eighteen hundred and ninety-seven, June sixth, nineteen hundred, and March third, nineteen hundred and one, are hereby repealed so far as they provide for the relinquishment, selection, and patenting of lands in lieu of tracts covered by an unperfected bona fide claim or patent within a forest reserve, but the validity of contracts entered into by the Secretary of the Interior prior to the passage of this Act shall not be impaired: *Provided*, That selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issue therefor the same as though this Act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof."

⁹ The act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976); Executive Order No. 6910 of November 26, 1934, and Executive Order No. 6964 of February 5, 1935.

authorizes the Secretary in his discretion to lift the reservation and restore lands to the public domain for disposal in accordance with his classification of them under applicable public land laws, such act of classification to be performed either upon the Secretary's own initiative or upon the petition of an applicant. In particular, the Secretary may examine, classify and open to entry, selection or location withdrawn lands—

* * * which are more valuable or suitable for the production of agricultural crops than for the production of native grasses and forage plants, or more valuable or suitable for any other use than for the use provided for under this Act, or proper for acquisition in satisfaction of any outstanding lieu, exchange or scrip rights or land grant * * *.

Implicitly under this section the Secretary has a duty to maintain the reservation and refuse a classification which he deems unsuitable or improper or in derogation of the purposes for which the lands have been reserved.

As to the instant application, the lands here selected and applied for are not "proper" for acquisition in satisfaction of the forest lieu right of reselection above described. In the first place they do not meet the requirements of the acts creating the forest lieu selection rights.¹⁰ By the act of June 6, 1900 (31 Stat. 614), forest lieu selections were to be confined to "vacant surveyed nonmineral public lands which are subject to homestead entry not exceeding in area the tract covered * * *" by the base surrendered. The lands here selected are not "public lands subject to homestead entry" but, as has been seen, are withdrawn, reserved lands. They may be restored to the public domain and may again become subject to homestead entry but only if they shall be classified by the Secretary as suitable for such entry. In fact, however, the lands here involved cannot be so classified. They are essentially forest lands, utterly unfit for grazing, valuable only for their timber, as appellant's own petition concedes, and wanted only for timber exploitation. In addition they have been found to be mountainous, rough, rocky and steep. Hence, even if cleared of their timber they would be unfit for agriculture and impossible of cultivation. Such lands are not suitable for homestead entry¹¹ and if application for homestead entry of them were

¹⁰ Whenever by act of the Congress provision is made for disposal of portions of public lands of a designated class and character, selection or entry thereof under such act cannot lawfully be permitted until the lands sought to be acquired are shown to be of the class and character subject to disposal thereunder. *Kern Oil Co. et al. v. Clarke* (On Review, 1902), 31 L. D. 288.

¹¹ *Winninghoff v. Ryan*, 40 L. D. 342 (1912), and cases cited. See also question 4 on Form 4-480 "Report of Fraudulent Claim or Entry." *United States v. Northern Pacific Railway Co.*, 311 U. S. 317, 362, 364.

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to be made, the Secretary would be obliged to refuse to classify them as subject thereto.

In the second place, to permit selection of these tracts believed valuable only for their timber and having a very substantial estimated value might mean the immediate and complete liquidation of this part of an exhaustible resource in which the whole people have a vital and paramount interest as concerns both conservation and forest values. Against a use of these lands so contrary to the public interest the Government has no guarantee or protection under the statute. The Secretary, having no authority to restore these lands for a disposal potentially in such derogation of the conservation aims of the Taylor Act and of the withdrawal order, is under a duty to maintain the reservation.

Appellant asserts that the tracts sought are isolated and disconnected and as such are of no value to the Government and should be disposed of. Only the 40-acre tract in Sec. 25 is an isolated tract. But even if both tracts sought were isolated, appellant's argument could have no weight. The Secretary has no authority to release even an isolated tract for a use which patently might injure the interest of the whole people.

The decision is

Affirmed.

MOTION FOR REHEARING

Ted E. Collins, substitute attorney in fact for J. A. Allison and Mark L. Johnson, selectors, has moved for a rehearing of the decision of December 4, 1942, in the matter of Coeur d'Alene 013862, an application to make a forest lieu selection under the acts of June 4, 1897 (30 Stat. 36), June 6, 1900 (31 Stat. 614), and March 3, 1905 (33 Stat. 1264).

Therein the Department affirmed the decision by the Commissioner of the General Land Office denying favorable action on the petition for classification and holding for rejection the selection of 80 acres in Idaho described as follows: T. 40 N., R. 3 E., B. M., Sec. 4, SE $\frac{1}{4}$ SW $\frac{1}{4}$; Sec. 25, SE $\frac{1}{4}$ NE $\frac{1}{4}$, in exchange for 80 acres of base land within the Sierra National Forest in California described as follows: T. 16 S., R. 31 E., M. D. M., Sec. 36, E $\frac{1}{2}$ SW $\frac{1}{4}$.

The Department based its decision on the finding that the lands selected were not proper for acquisition in satisfaction of an outstanding lieu right as required by section 7 of the amended Taylor Grazing Act. This was because upon examination they were found not to be of the class and character subject to disposal under the

legislation creating the right¹ and because they were affected by a public interest. Being essentially forest lands, valuable *only* for their timber and so mountainous, rough, rocky and steep that even if cleared they would be impossible of cultivation and unfit for any agricultural use, they were not subject to homestead entry. Further, in the absence of any statutory controls, alienation of them might mean immediate and complete liquidation of their part of an exhaustible resource in derogation of the conservation aims of the Taylor Act and of the withdrawal order of November 26, 1934, issued in aid thereof.

Appellant's attorney has assigned several specifications of error and in his motion has made brief comments thereon but he has filed no formal brief and argument. His basic contention seems to be that the departmental decision gave a new and erroneous construction to the provision of the act of June 6, 1900 (31 Stat. 614), confining selections to "vacant surveyed nonmineral public lands which are subject to homestead entry." It was error, he says, to hold that "lands valuable for timber" could not be classified as "subject to homestead entry" and as meeting the 1900 requirements. He asserts that the clause "subject to homestead entry" meant—

* * * lands on which there was no prior occupation, which were nonmineral and on which a homestead entry could be made even though the homesteader did not or could not raise agricultural crops.

He further says that the Department has many times decided that—

* * * a homesteader who makes an entry in good faith and resides thereon for the period specified in the law may devote his lands to any useful purpose.

Appellant's contention shows a misapprehension of the holding of the 1942 decision and is incomplete and in part inaccurate as to homestead law and land department practice thereunder. The purpose of the homestead law was to give homes and to promote resident, agricultural holdings upon the public lands. To that end the law required residence, improvement *and cultivation* as proof of the establishment of an actual agricultural home. However, under the administrative practice which developed in the General Land Office it came to be considered that use of the land for farming, or agriculture in its broad sense, whether the planting and harvesting of crops, the growing of hay or the raising of cattle, horses, hogs, etc., would answer the requirement as to cultivation. Hence, lands suitable for a farming, or agricultural, use were considered subject to homestead entry but lands of a character not adapted to any such

¹ *Kern Oil Co., et al. v. Clarke* (On Review, 1902), 31 L. D. 288. *Instructions of March 6, 1900*, 29 L. D. 578, 580, par. 3; *Instructions of March 19, 1901*, 30 L. D. 538.

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use were not so subject.² Similarly, lands subject to homestead entry under land department practice were agricultural lands in the sense described.

Accordingly, as to timbered lands, the fact that land was covered with timber, even valuable timber, did not exclude it from homestead entry *if removal of the timber would render the land suitable for some agricultural or farming use*. But heavily timbered land of such character otherwise³ that it would be unfit for cultivation or for any agricultural use even if cleared of its timber *and therefore would be valuable only for its timber* was not subject to homestead entry.⁴ This rule was retained in the administration of the Three-Year Homestead Law of June 6, 1912 (37 Stat. 123). In certain circumstances this act permitted reduction of the area required to be cultivated. As to this in connection with timbered lands the Secretary instructed the Commissioner of the General Land Office in part as follows:

*No reduction in area of cultivation will be permitted on account of expense in removing the standing timber from the land. If lands are so heavily timbered that the entryman can not reasonably clear and cultivate the area prescribed by the statute, such entries will be considered speculative and not made in good faith for the purpose of obtaining a home. [Italics supplied.]*⁵

In 1940 when the Supreme Court in *United States v. Northern Pacific Ry. Co.*, 311 U. S. 317, 361-364, was considering what lands were the "agricultural" lands which the railroad was entitled to select in lieu of mineral lands lost it adopted and made the basis of its decision the land office concept of lands subject to homestead entry which has just been described. It held that the "agricultural" land which might be selected was only such land as by land office practice and public land laws would have been available to individuals for clearing and subsequent cultivation or for grazing or for any other purpose commonly classified by the land office as coming within the preemption and homestead laws *and that such agricultural land did not include land valuable solely for timber*. In developing its conclusion the court said:

Under the administrative practice, although lands containing timber could be taken for homes in the public land states, a certain portion of the lands

² *J. J. McCaskill Co. v. U. S.*, 216 U. S. 504, 510; *Jacklin v. Samuelson*, 2 L. D. 73; *Charles C. Waters*, 3 L. D. 140; *George Hathaway*, 38 L. D. 33; *Davis v. Gibson*, 38 L. D. 265; *Circular of July 15, 1912, Paragraph (3) "Cultivation,"* 41 L. D. 103, 104; *United States v. Northern Pacific Ry. Co.*, 311 U. S. 317, 361.

³ Mountainous, steep, rough, broken, of poor quality, etc.

⁴ *Finley v. Ness*, 38 L. D. 894; *Winninghoff v. Ryan*, 40 L. D. 342.

⁵ *Instructions of September 6, 1913*, 42 L. D. 343-4. See also *Patton v. Quackenbush*, 35 L. D. 561.

had to be cleared preliminary to cultivation. But, *the pre-emptor or homesteader has not been permitted to take up lands valuable only for timber or for stone or for some other use, which could not be rendered cultivable or usable in a broad sense for farming, by clearing or other work done thereon.* * * * [Italics supplied.]

Such were the requirements and the practice under the homestead law. Hence when by the act of June 6, 1900, the Congress required forest lieu selections to be lands "subject to homestead entry" it is only reasonable to suppose that the Congress had in mind the type of lands which the land department regarded as subject to homestead entry, namely, lands which were adapted to the purpose of the homestead law, lands which could be lived upon, improved *and cultivated or put to some one of the farming uses* which land department practice was accepting as the equivalent of cultivation. It would be unreasonable to suppose that the Congress intended to permit selection of unusable mountain lands which land department practice excluded from homestead entry, timbered lands which were valuable *only* for their timber because even if cleared they would remain unfit for any cultivation or for any agricultural use accepted in lieu thereof. It would be impossible for a settler-selector in good faith to prove a farming use of such lands and absurd and unjust for the Congress or the land department to encourage him to make the attempt.

These conclusions are seen to be inescapable when one recalls that the forest lieu legislation extended the right of exchange not only to *owners* of lands in forest reserves but to forest reserve *settlers* under the homestead law who held unperfected claims not covered by patent certificate and who would still have to earn their land. There is no reason to believe that the term "subject to homestead entry" was to mean one kind of land for owners and another kind for settlers. The regulations made clear what kind of land settlers must select. Selections in lieu of unpatented claims were required to conform to the *homestead law*. Selectors who had resided upon, improved and cultivated the relinquished unperfected claim for only part of the period required by law to earn a patent thereto were required to establish and maintain a residence on the land selected and to improve and cultivate it for the balance of the statutory period.^a

It is also to be recalled that lands which were formerly embraced in the Fort Assiniboine Military Reservation and which by the act of April 18, 1896 (29 Stat. 95), were opened to the operation of several public land laws, among them the homestead law, in order to promote development of their resources thereunder were in 1905 held subject also to selection under the *subsequently enacted* forest lieu selection

^a Instructions of July 7, 1902, 31 L. D. 372, 376, paragraphs 28, 29 and 30.

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laws of 1897 and 1900. Basic to the decision was in part the reasoning that the abandoned reservation lands as lands subject to homestead entry met the requirement of the 1900 lieu law and that *development of their resources by residence, improvement and cultivation* could follow as well from selection under the forest lieu legislation as from entry under the homestead law.⁷

It is clear therefore that the decision of December 4, 1942, gave no new construction to the term "subject to homestead entry." Like the Supreme Court case cited, the Department adopted and applied the long-standing land office definition of the term. Finding the selected lands valuable *only* for their timber, it held them not subject to homestead entry. It is not clear why appellant should have misquoted the decision on this point and taken no account of the complete rule as to timber lands or the explanation of it in the cases cited in footnote 11 of the decision.

Nor is it apparent why he should have asserted that the decision "disregarded" section 7 of the Taylor Grazing Act. To determine whether the selected lands were "proper" for this disposal the Department made two inquiries. It asked whether the selected lands met the criteria set by the statute creating the lieu right herein asserted and it asked whether disposal of them would be compatible with the conservation purposes for which they had been withdrawn. On neither count did it find the lands "proper" for this alienation. They were not subject to homestead entry. They were affected by a paramount public interest. They had been withdrawn by the Executive order of November 26, 1934, in aid of a comprehensive land program for the conservation and development of natural resources. Their one value, which was substantial, was in their timber, an exhaustible resource. In the absence of statutory powers enabling him to prevent liquidation of this resource after alienation of the land producing it, the Secretary found it a duty to maintain the reservation pending development of the conservation program. By these inquiries and findings therefore the Department, far from disregarding section 7, gave both content and effect to it and to the conditions which it makes precedent to classification and restoration of lands to the public domain for selection.

According to appellant, the decision should have found the logging and marketing of this timber to be in the public interest because contributing lumber to the war effort. He says further that whether timber should be withheld or allowed to be cut and used must depend upon the facts in each case. Also, in support of his motion, he files

⁷ Charles Ziegler, 34 L. D. 296.

a statement by the Land Agent of Potlatch Forests, Inc., describing the company's long-term, selective logging policy and its war production record. In essence appellant urges approval of this selection as true conservation because the selected tracts are largely surrounded by lands controlled by the company and are in the path of the company's operations; because the company's methods are good; and because 90 percent of its production is going into war needs. Moreover, it is said the Secretary has discretion to open these lands to this selection.

It is patent that this argument discards the statutory rules for determining whether a selection should be allowed and would set up in their place *ad hoc* criteria, varying with the whim of the Secretary; also, that it mistakes the nature of the Secretary's discretion. In fact, the Secretary is bound by the applicable statutes and may not substitute for their conditions standards of his own or appellant's choosing. The discretion which section 7 confers on him to examine and classify lands and to restore or to refuse to restore them to public disposition is no absolute discretion to be exercised arbitrarily or willfully. It is instead a sound, impartial discretion guided and controlled not only by a due regard for the facts in a particular case, among them those bearing on the public interest, but by a punctilious respect for the established principles of law applicable thereto.

In this case the tests to be met are those laid down in section 7 of the Taylor Grazing Act as amended and in the forest lieu laws. They concern nothing but the status and character of the lands selected and the compatibility of the proposed alienation with the purposes of the Executive withdrawal mentioned. Insofar as the Department knows, there is no provision in the War Powers Acts or in any other legislation which would authorize the President, or his executive representative, the Secretary of the Interior, to consider the instant selection with reference either to the war or to the qualifications of appellant's transferee, a stranger to the record, despite the importance of both those factors, instead of with reference to the classification specifications by the statutes mentioned.

Appellant charges the Department with error in failing to find—

* * * that this forest lieu selection right is a property right valid under the applicable acts of Congress and subject to satisfaction and location on lands of the character and in the situation found in this particular case.

He says that the language and intent of the law and the long continued practice of the Interior Department have established a rule of property which requires the Secretary to permit satisfaction of this right. The character of the lands here sought and their ineligibility

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for this selection have already been discussed. As for the right of selection, to refuse approval of a particular selection because it does not meet legal requirements is neither to repudiate nor to destroy the right sought to be exercised. The Department has always regarded a valid right of selection as a property right and continues to permit its satisfaction when the proper parties, complying with the regulations, exercise it with reference to lands which, whether base or selected, meet the conditions of the statutes and the regulations and which if reserved may be restored to selection without injury to paramount public interest.

This is not however to say that the Department will permit an exchange to be effected when the reason for an exchange no longer exists. Forest reserve boundaries continue to be changed. Base lands may be excluded therefrom. The reselection right is subject to such changes and may be defeated by them. There are no equities to be considered in the case of a selector who in disregard of the rules fails to perform the selection requirements within the period reasonable in the circumstances of his case. He who delays assertion of his right risks its entire loss.

Appellant points out that the United States has had the title and the use of the base lands herein for more than 40 years. He implies that this fact should incline the Department to allow this selection. There is no obligation on the Government in such premises. In this case because of adverse proceedings against the owner of the base lands the original selection was pending until 1920. Then it was canceled. Under the relief act of September 22, 1922 (42 Stat. 1017), the grantor had five years from that date in which to recover his relinquished lands. He chose not to act. Later under the act of April 28, 1930, ch. 219, sec. 6 (46 Stat. 257, 43 U. S. C. sec. 872), it was open to him or his attorney-in-fact to apply to the Commissioner of the General Land Office for a quitclaim deed of the base land and this privilege has continued to exist. Instead of availing themselves of it, they have elected not only in their private dealings but in their motion papers as well to treat as "scrip" the exchange right which the Department has consistently refused⁸ to regard as scrip and, contrary to the rules and decisions of the Department, to delay the making of a selection for nine years, risking defeat of their alleged right by changes in both the reserve boundaries and the gov-

⁸ *John K. McCornack*, 32 L. D. 578; *George L. Ramsey*, decision of December 26, 1942, *infra*, pp. 283-284, and cases cited; also decision of August 21, 1943, *infra*, pp. 294-296.

erning law.⁹ Selectors in such case will not be heard to complain against the Government because of adverse consequences made possible by their own course.

The Department's consideration of the appeal and of the motion for rehearing in this case is without prejudice to the Department's right to inquire into the validity of the right of reselection here sought to be exercised.

The motion is

Denied.

REX BAKER

Decided December 4, 1942

PUBLIC LANDS—WATERS—ACCRETION—ACT OF AUGUST 7, 1846.

According to the plat of survey of 1845 two tracts of public land in Arkansas had for their east boundary the west bank of the Mississippi River. Between 1843 and 1880 the waters of the river gradually eroded and submerged all of the land within the tracts and land to the west thereof and the main channel of the river ran west of the tracts, but following this submergence, land in the form of a sand bar reappeared within the boundaries and to the full extent of the tracts, the reappearance being caused by the westerly recession of the waters and by accretion to private land in Tennessee which in 1880 had attained an elevation of from 5 to 10 feet above the river. By an avulsive change in the course of the river in 1912, the main channel of the river ran southeast of the land. The boundary of the Mississippi River between Arkansas and Tennessee was fixed by the Supreme Court on June 3, 1940. A supplemental survey by the General Land Office disclosed that but 2.02 acres of one of the tracts were in Arkansas, the remainder of the two tracts being in Tennessee. In April 1934 homestead entry was allowed for the two tracts according to the original plat of survey, which subsequently to the filing of supplemental plat of survey was reduced to the 2.02 acres remaining in Arkansas.

Held: (1) That the reappearance of the land was the result of gradual accretion to the land in Tennessee before the avulsive change in the river channel and the avulsion was not the cause of its reappearance. (2) That when the land became a part of the bed of the Mississippi River, the title thereto became vested in the State or States within whose boundaries it was situated, and upon its reappearance, the title to the land was governed by the State law. (3) That neither the laws of Arkansas nor Tennessee, as interpreted by its highest court, afford sufficient basis for holding that the reappeared land became the property of the United States, and if the Department should so hold, its holding would

⁹ Had section 7 of the Taylor Grazing Act not been amended by the act of June 26, 1936 (49 Stat. 1976), all outstanding forest lieu selection rights would have been suspended indefinitely,—until revocation of the withdrawal order of February 5, 1935. Under the amendment the right may be satisfied if the conditions be met and the public interest permit.

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not bind an adverse claimant. (4) That considering the act of August 7, 1846 (9 Stat. 66), ceding to Tennessee the public land south of the Congressional Reservation Line and the legislative history of the act, it is believed to have been the intent and purpose of Congress, in order to settle all controversy with the State and to rid the Federal Government of all administration of the remnants of public lands in the State, to divest itself of all ownership and jurisdiction over the public lands in Tennessee at once and forever, and though the act of cession at the time of its enactment passed the title only to the land ceded by North Carolina, it seems improbable that it was the intention that the United States was to retain its ownership and apply its system of disposition under the public land laws to such small fragments of public lands in Arkansas that were washed away by gradual changes in the channel of the river, but subsequently reappeared in the State of Tennessee. (5) That it had not been satisfactorily shown that either the lands in Arkansas or Tennessee are public lands subject to disposition under the public land laws, and there was no sufficient reason for surveying any part of them as such.

CHAPMAN, *Assistant Secretary*:

The homestead application of Rex Baker; G. L. O. 04744, was allowed April 18, 1934, for fractional SW $\frac{1}{4}$ Sec. 26 and fractional NW $\frac{1}{4}$ Sec. 35, T. 14 N., R. 12 E., 5th P. M., Arkansas, according to the original plat of survey of said township and range approved October 27, 1845.

Baker submitted final proof on the entry June 15, 1937, but action was suspended pending a field investigation and a determination by the Supreme Court as to the boundary line between Arkansas and Tennessee in a suit then pending between those two States, the Commissioner of the General Land Office taking the position that if the land or any part thereof was within the boundaries of the State of Tennessee, such land was not subject to disposal under the public land laws (letters to Senator Caraway dated June 13, 1938, and December 6, 1940). The Supreme Court confirmed the report of the master fixing the location of the boundary between the two States (*Arkansas v. Tennessee*, 310 U. S. 563, 572, June 3, 1940). That part of the boundary affecting the land in question was that part fixed pursuant to a stipulation between the parties, but no connections being given in a description of the stipulated boundary to corners of the public land surveys, a survey was directed to determine the position of the stipulated boundary with reference to such surveys (letter "E" G. L. O. December 6, 1940). The survey was made in April 1941 and plat thereof accepted August 8, 1941. This plat discloses that all of the land but 2.02 acres in the extreme northwest portion of the SW $\frac{1}{4}$ Sec. 26 is within the State of Tennessee. The investigating special agent reported that the Anderson-Tully Lumber Company claimed the land as being in the State of Tennessee and

had caused Baker to be ousted from the premises and had destroyed his improvements.

By decision of October 21, 1941, the Commissioner of the General Land Office adjusted the entry to read Lot 1, Sec. 26, T. 14 N., R. 12 E., 5th P. M., Arkansas, containing 2.02 acres, being that part of the land then within the State of Arkansas. Baker appealed, contending that he was entitled to a patent for the whole tract entered and requested a hearing as to all matters of law and fact touching his rights to said homestead entry.

In support of the appeal, there was filed an affidavit by O. W. Gauss. To this affidavit is attached plats or maps as follows:

1. A copy of the original plat of survey of T. 14 N., R. 12 E., 5th P. M., approved October 27, 1845.

2. Chart No. 14 made under the direction of the Mississippi River Commission of the survey of the Mississippi River made in 1879-1880.

3. The current United States Engineer's Quadrangle (Blytheville, Grid Zone "C") prepared by the United States Engineers from aerial reconnaissance and ground work, revised by the Mississippi River Commission in 1932, 1935 and 1939.

4. Photolithographic copy of the supplemental plat reestablishing the boundaries of Sec. 26, T. 14 N., R. 12 E., to accommodate the entry of Rex Baker.

5. A map prepared by Gauss correlating the maps above referred to and depicting the changes that had taken place in the course of the Mississippi River since the original survey of the township.

Gauss, among other things, states that he is a civil engineer, and has been practicing engineering in Arkansas, Tennessee, Mississippi, and Missouri for 25 years last past and was one of the Commissioners appointed by the Supreme Court to establish the boundary between the States of Arkansas and Tennessee in the vicinity of the Forked Deer Island and the township in question; that—

In 1843-1845 the Fractional SW $\frac{1}{4}$ Section 26, and E $\frac{1}{2}$ NW $\frac{1}{4}$ Section 35, Tp. 14 N. R. 12 E., bordered on the Mississippi River and lay on the right or Arkansas side; subsequently, and between 1845 and 1880, the river caved westwardly, and eroded the Arkansas bank to such an extent that the above described lands disappeared as land in place, and became the bed of the Mississippi River. During all of this time the main channel of the river was on the Arkansas side of Forked Deer Island, and generally against the right or Arkansas bank. About the year 1912, the river made for itself a new main channel down the Tennessee side of Forked Deer Island, widening the old Tennessee chute of that Island, and since that date the main channel has been on said Tennessee side of the Island. There is now a chute of water flowing around the Arkansas bank of Forked Deer Island about 500 feet wide, but all the area to the east and south thereof has been consolidated and joined

to Forked Deer Island; and the lands embraced the homestead of Rex Baker, to-wit: The Frl. SW $\frac{1}{4}$ Sec. 26 and Frl. NW $\frac{1}{4}$ Sec. 35, have reappeared as land in place.

that—

Affiant further states that the official data available shows conclusively that the lands above described were a part of the bed of the Mississippi River in 1847; and that said lands were never included in any of the Tennessee grants touching Forked Deer Island.

Affiant further states that Forked Deer Island is a name applied to both Islands 26 and 27 and all adjacent territory, the said islands, while originally distinct and separate, by the action of the river became united as one body of land, divided only by a Chute known as "Dead Woman" or Willow Chute. The consolidation of Islands 26 and 27 had been completed as early as 1874, as shown on the map of the Reconnaissance Survey of Major Charles R. Suter, Corps of Engineers, U. S. A., made that year.

At their request the attorneys for the appellant were allowed to present oral arguments in support of their contentions before the Acting Assistant Secretary. As the result of certain inquiries made at that hearing, the appellants have furnished a number of affidavits to the effect that at the time of Baker's entry upon the land it was vacant and unoccupied and no part thereof was improved or cultivated and reaffirming the matters related to the special agent respecting the forcible ouster of Baker from the land and its detention by the Anderson-Tully Company. Additional argument was also presented in support of legal propositions advanced by the appellant.

The appellant contends that as the land belonged to the United States at the time of its erosion, under the laws of both Arkansas and Tennessee upon reappearance of land in place at the *locus in quo*, it again became the property of the United States, and regardless of whether it reformed in the one State or the other, the land was subject to entry under the public land laws as vacant, unappropriated public lands of the United States; that the land being in Arkansas on August 7, 1846, when Congress passed the act releasing to the State of Tennessee all the vacant, unappropriated and refuse lands south of the Congressional Reservation Line, the said act was ineffectual to release the lands in question to Tennessee as said act cannot be construed as prospective in operation.

By direction of the Department, the appellant served copies of his showing upon the Anderson-Tully Company and at the invitation of the Department that company has filed a response. Briefly stated, the respondent alleges that it and its predecessors in interest have had open, complete and notorious possession of and paid taxes on the land for over a hundred years, and that the records of Lauderdale County, Tennessee, show a good record title thereto in this

respondent and its predecessor in interest for 142 years. The respondent admits that it tore down a shack on the land of trifling value in 1937, but says that no claim has been made or suit filed since said date on account of its action.

The respondent contends that excepting the 2.02 acres, the SW $\frac{1}{4}$ Sec. 26 and NW $\frac{1}{4}$ Sec. 35 were part of the land of North Carolina and was granted by legal grant to its predecessors in title; that with the exception of 2.02 acres, the United States never owned the tracts, and therefore they were never subject to entry under the homestead laws; that the boundary line, so far as the same is applicable to this record, has been the boundary of Arkansas since its admission to the Union; that the United States has no authority to issue homestead rights upon lands in Tennessee; that there is no proof in the homestead claim that the applicant took possession or resided on the 2.02 acres, and no patent should issue for any part of said 2.02 acres.

From the data supplied by the appellant, the following conclusions of fact seem to be warranted: In 1843 when, as the official plat of survey shows, the township in question was surveyed, the east boundary of the tracts in question was the west bank of the Mississippi River. Assuming that the appellants have correctly superimposed upon Chart 14 the position of the tracts in question, that chart indicates that between 1843 and 1879 or 1880 the waters of the Mississippi River had gradually eroded and submerged all the lands within the tracts in question and considerable land to the west thereof and the main channel of the river ran west of the tracts in question, but following this submergence land in the form of a sand bar had reappeared within the boundaries and to the full extent of said tracts; the reappearance being caused by the recession of the waters of the river westerly and by accretion to Deer Forked Island Nos. 26 and 27 in the State of Tennessee. The contour lines on Chart 14 show that the sand bar had attained an elevation of at least 5 to 10 feet above the waters of the river and that cottonwood growth extended to the east boundary of the land. The Blytheville Quadrangle indicates that between 1880 and 1939, the Mississippi River had changed its course and the main channel was southeast of the land, following and widening a chute shown on Chart 14, denominated by Mr. Gauss as the Tennessee Chute; that the land in question had not built up to any greater elevation, but was partly intruded by timber growth. For the purposes of this case it will be assumed that the marked change in the course of the river was owing to an avulsive change in 1912, as alleged by the appellant. The said quadrangle further shows a channel called Canadian Reach

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containing water without an outlet, was farther west of the Arkansas bank as it existed in 1880, indicating that after Chart 14 was prepared the river eroded lands farther westerly in Arkansas. The quadrangle also depicts a curved channel but no stream of water connecting with the Canadian Reach and running approximately along or near the boundary between the States as now established and through the extreme northwestern portion of the land in question. The field notes of supplemental survey of Sec. 26 describe this as "Another channel dry except during extreme high water crosses the fractional section near the Arkansas-Tennessee boundary." It is alleged in the supplemental memorandum brief of the appellant that the Anderson-Tully Company "claim all of Forked Deer Island and the land in question, as accretions thereto, notwithstanding the fact that these lands are separated from their lands by a living stream of water known as Willow, or Dead Woman's Chute." It will be noticed Gauss stated that Willow or Dead Woman's Chute divides Island 26 from Island 27. There is nothing shown as to the exact location of this chute or to impel the inference that the progress of accretion to Forked Deer Island westwardly was prevented by its existence.

Considering all data available, it seems that the reappearance of the land in question was the result of gradual accretion to Forked Deer Island before the avulsion of 1912 took place and formed a new channel for the Mississippi River, and that its reappearance and character as fast land was not substantially affected by such avulsion.

The original boundary between the Territory of Arkansas and the State of Tennessee was the middle of the main channel of navigation of the Mississippi River as it existed when the treaty of peace between the United States and Great Britain was concluded in 1783, subject to such subsequent changes as occurred through natural and gradual processes; and when Arkansas was admitted into the Union on June 15, 1836 (5 Stat. 50), its eastern boundary was fixed as the middle of the main channel of that river (*Arkansas v. Tennessee*, 310 U. S. 563, 565, 567).

The Mississippi River was east of the land in question at the time of the survey of the township in 1843 and the land was public land and subject to homestead entry at the date of the filing of the plat of survey to the extent of the land not then eroded by the river. The present boundary between the States in so far as it affects the land in question, is that established by stipulation and is evidently not the original boundary. There is, therefore, no basis in fact for the contentions of the Anderson-Tully Company that the land was

part of North Carolina; that they have a good record title thereto for 142 years or that such boundary is the boundary between the States when Arkansas was admitted into the Union.

The technical title to the beds of navigable rivers of the United States is either in the States in which the rivers are situated or in the owners of the land bordering upon such rivers; whether in one or the other is a question of local law. *United States v. Chandler-Dunbar Water Power Co.*, 229 U. S. 53; *Archer v. Greenville Sand & Gravel Co.*, 233 U. S. 60; *Hardin v. Jordan*, 140 U. S. 371; *Philadelphia Co. v. Stimson*, 223 U. S. 605; *Arkansas v. Tennessee*, 246 U. S. 158, 175, 176. The observations of the court in the last-cited case respecting the application of this doctrine have pertinent bearing here. The court said (pages 175, 176):

How the land that emerges on either side of an interstate boundary stream shall be disposed of as between public and private ownership is a matter to be determined according to the law of each State, under the familiar doctrine that it is for the States to establish for themselves such rules of property as they deem expedient with respect to the navigable waters within their borders and the riparian lands adjacent to them. *Pollard's Lessee v. Hagan*, 3 How. 212, 230; *Barney v. Keokuk*, 94 U. S. 324, 338; *Hardin v. Jordan*, 140 U. S. 371, 382; *Shively v. Bowlby*, 152 U. S. 1, 40, 58; *St. Anthony Falls Water Power Co. v. Water Commissioners*, 168 U. S. 349, 358; *Scott v. Lattig*, 227 U. S. 229, 242. Thus, Arkansas may limit riparian ownership by the ordinary high-water mark; (*Railway v. Ramsey*, 53 Arkansas, 314, 323; *Wallace v. Driver*, 61 Arkansas, 429, 435, 436;) and Tennessee, while extending riparian ownership upon navigable streams to ordinary low-water mark, and reserving as public the lands constituting the bed below that mark (*Elder v. Burrus*, 25 Tennessee, [6 Humph.] 358, 368; *Martin v. Nance*, 40 Tennessee [3 Head], 649, 650; *Goodwin v. Thompson*, 83 Tennessee [15 Lea], 209), may, in the case of an avulsion followed by a drying up of the old channel of the river, recognize the right of former riparian owners to be restored to that which they have lost through gradual erosions in times preceding the avulsion, as she has done in *State v. Muncie Pulp Co.*, 119 Tennessee, 47. But these dispositions are in each case limited by the interstate boundary, and cannot be permitted to press back the boundary line from where otherwise it should be located.

It follows that when the land in question here was eroded in the progress of the Mississippi River westward and became a part of the bed of that river, the title thereto became vested in the State or States within whose boundaries the land was situated, and upon the reappearance of the land, the question of title thereto is governed by the law of the State in which the land reappeared.

In support of the contention that upon the reappearance of land on the situs of fractional sections in question, the land became the property of the United States as the former owner thereof under both the law of Arkansas and of Tennessee, the appellant cites the

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Act of the Arkansas Legislature No. 127 of 1901 (sec. 6783, Crawford and Moses Dig., 1921), section 1 of which provides:

That all land which has formed or may hereafter form, in the navigable waters of this state and within the original boundaries of a former owner of land upon such stream, shall belong to and the title thereto shall vest in such former owner, his heirs or assigns, or in whoever may have lawfully succeeded to the right of such former owner therein.

And *Mills v. Prothro*, 143 Ark. 117, 219 S. W. 1017; *State v. Muncie Pulp Co.*, 119 Tenn. 129, 130, 104 S. W. 437; *Stockley v. Cissna*, 119 Fed. 812; *Stockley v. Cissna*, 119 Tenn. 135, 104 S. W. 792; *Keel v. Sutton*, 142 Tenn. 341, 219 S. W. 351; *Arkansas v. Tennessee*, 246 U. S. 158. The appellant says in his supplemental brief that "The title is in the government because of the fact that the law of the State of Tennessee on the question of restoration indisputably gives the land back to the original owner." It will be observed that the appellant is presenting to the Department for determination not the question whether title to the land passed from the United States under any public land law, but whether the United States has regained the title under the laws of the States mentioned. It is believed that the appellant is right in his position that if the reappeared land is owned by the United States, it owns it by operation of the State law. It is a settled rule in the Federal courts that except where the Constitution, treaties or statutes of the United States otherwise require or provide, these courts adopt the local law of real property as ascertained from the decisions of the State courts, whether such decisions are grounded upon the statutes of the State or form a part of the unwritten law of the State which has become a rule of property. *Ray v. Norseworthy*, 23 Wall. 128; *Woods v. Freeman*, 68 U. S. 398. For other cases see 22 Federal Digest, Courts, sec. 365 (16).

The Department will not undertake to do what it did in *Towl et al. v. Kelly and Blankenship*, 54 I. D. 455, determine the title to a tract of public land eroded by the Mississippi River and submerged but subsequently reappearing by what it conceives to be the common law with respect to riparian rights and the effect of erosion and submergence, upon the assumption that the common law and not the law of the State in which the land was situated governs. It cannot properly be considered under any other law than that of the State in which the land is situated, not only because of the settled rule that in the absence of congressional legislation the law of the State is controlling in matters of title to real property, but for the further reason that in the recent case of *Erie R. Co. v. Tompkins*, 304 U. S. 64, the Supreme Court held that:

Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. There is no federal general common law. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of the law of torts. And no clause in the Constitution purports to confer such a power upon the federal courts. [p. 78.]

The Court further quoted with approval from the dissenting opinion of Mr. Justice Holmes in *Black and White Taxicab Co. v. Brown and Yellow Taxicab Co.*, 276 U. S. 518, 532-536, a part of which is as follows:

The common law so far as it is enforced in a State, whether called common law or not, is not the common law generally but the law of that State existing by the authority of that State without regard to what it may have been in England or anywhere else. * * * the authority and only authority is the State, and if that be so, the voice adopted by the State as its own [whether it be of its Legislature or of its Supreme Court] should utter the last word.

In so far as concerns the title of the United States to the small area of the land in Arkansas, doubt arises whether the statute of the State above set forth has any application in this case. The preamble to the act of 1901 reads as follows:

Whereas, Owners of land along navigable rivers often suffer by having such land washed away; and,

Whereas, Under existing laws if such land re-forms as an island in a navigable stream though within the original boundary of the former owner, it belongs not to him but to the state; *Therefore*, * * *

In the case of *Mills v. Prothro*, *supra*, the facts were that the Arkansas River washed away a considerable part of the lands of three riparian owners, but later the land reappeared as an island within the boundaries of the tracts claimed by these owners. One of them claimed title to all of the island by accretion on the ground that the accretion started opposite his land. The court applied the act and quieted the title of each of these owners to that portion of the island opposite their tracts, as land formed within their original boundaries, but said:

We are not called on in this case to pass upon either the validity or effect of the statute so far as it concerns lands formed in navigable streams to the shore line by gradual accretion, and we refrain from deciding anything in regard to that feature of the statute, but confine the present decision to the interpretation of the statute so far as it relates to islands formed in navigable streams, which, under the law as it existed prior to the enactment of this statute, belonged to the state.

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In *Bush et al. v. Alexander*, 134 Ark. 307, 203 S. W. 1028, it was held that the act under consideration did not affect, prior to its passage, vested rights of the defendant who claimed the land as an accretion to land owned by him. As above stated, it seems from the facts in the instant case the land involved reappeared as an accretion to the shore line of Forked Deer Island in Tennessee prior to 1880. The law therefore cited by the appellant affords the Department no assurance that the courts of Arkansas would hold that title to the 2.02 acres was in the United States.

As respects the title to the land within Tennessee, the brief of the appellant purports to quote an expression from *Stockley v. Cissna*, 119 Tenn. 135 (104 S. W. 803), the exact words of which are as follows:

* * * Land lost by erosion or submergence is regained to the original owner, when by reliction or accretion the water disappears and the land emerges.

Expressions of the court are also quoted from *Stockley v. Cissna*, 119 Fed. 812, and *Keel v. Sutton*, 142 Tenn. 341, of similar import. Upon critical examination of these cases, as well as *State v. Muncie Pulp Co.*, *supra*, it is the view of the Department that these general expressions, when limited to the facts of the case in which they occur, do not have such broad application as appellant attributes to them, or cover every instance where land is eroded by waters of a navigable river and subsequently reappear. In the case of *Keel v. Sutton*, *supra*, the controversy was between a riparian owner whose lands had been washed away, but which subsequently reappeared by accretion formed against his own land and a party who claimed the accreted land by adverse possession and a tax title and the passage from the opinion quoted by appellant related to that situation.

The controversy between *Stockley* and *Cissna* in both the Federal and State courts related to a body of land that reappeared in consequence of an avulsive change in the course of the Mississippi River in 1876. One tract of 131 acres was washed away in consequence of the avulsive change in the course of the river in 1876, but which subsequently reappeared. The other tract of 1050 acres which included the land of Trigg which had been eroded prior to the avulsion, reappeared by accretion or drying up of the bed in consequence of the avulsion. *Stockley* showed title to a back tract which became riparian by the washing away of the Trigg land in front of his tract, but did not establish any title to the Trigg land. The facts were somewhat complicated and a number of questions were presented, but we deem it sufficient here to state that in the ejectment suit in the Federal

court Stockley claimed title to both tracts as accretions to the land he owned and in addition claimed title to the 1050 acres under a grant from the State to him in 1901; that the court held that the reappeared land was not an accretion to the land owned by Stockley but a restoration; that Trigg did not lose his title to the land which reappeared within his original boundaries; that whether accretion or not, Stockley could not recover in ejectment without showing either that he was a riparian proprietor against whose lands the *locus in quo* had formed or that he had a legal title derived from some other source; that he had shown neither and his bill was dismissed. In the forcible entry and detainer suit, the Supreme Court of the State found that the 1050 acres were formed in the bed of the river as a result of avulsion; that Stockley had shown no actual possession of the 1050 acres and could not claim possession as an accretion to the main shore in his possession; "that the locus in quo of the present controversy and the rights of the litigants must be determined by the law applicable to a technical avulsion, and not to the rule governing accretions." (page 800.) As to the 131 acres, Stockley having cured the defect in his chain of title and shown a deed from the Trigg heirs for a tract including the 131 acres, and since he was in possession of the remaining land under said deed, it was held that he was in constructive possession of the 131 acres at the time of defendant Cissna's entry. The court held that the 131 acres were not an accretion to the land acquired by Stockley under the deed but a restoration of part of the land swept away by the Centennial flood of 1876.

The case of *State v. Muncie Pulp Co.*, *supra*, as was said in *Arkansas v. Tennessee*, *supra*, was a case of avulsion followed by the drying up of the old channel of the river, wherein the rights of former riparian owners to be restored to that which they had lost by gradual erosions in times preceding the avulsion were recognized.

It is settled beyond the possibility of dispute that when the bed or channel of a running stream form a boundary between private proprietors and changes by gradual and natural processes known as erosion or accretion, the boundary follows the varying course of the stream; while if the stream from any cause, natural or artificial, suddenly leaves its old bed and forms a new one by the process known as avulsion, the resulting change of channel works no change of boundary, which remains in the middle of the old channel, although no water may be flowing in it, and irrespective of subsequent changes in the new channel. *Arkansas v. Tennessee*, *supra*, and cases cited.

In none of these cases considered above was the question squarely presented whether lands reappearing by recession of the waters of a navigable river as accretion to riparian land and covering in the

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process of accretion the lands of a former owner whose lands have been washed away, belong to the riparian owner to the full extent of the accretion or whether his ownership stops at his former boundaries. In the case where lands once remote become riparian by erosion and subsequently the water recedes, uncovering all the once remote land and also the original riparian tract, the courts are divided in opinion as to whether the remote lands are restored to the extent of the land uncovered or only to their former limits. *Towl et al. v. Kelly and Blankenship, supra*. Notes to *Yearsley v. Gipple*, 8 A. L. R. 640, *et seq.* (Nebr.).

From what is said above it is not believed that sufficient basis exists for the Department to hold that the land in question is the property of the United States. If the Department should so hold, on the basis of its interpretation of State law, its decision would not be conclusive upon any adverse claimant of the land.

Whether there is any evidence to sustain a claim or finding of fact in a controversy before the land department over the title to public land is a question of law, and an error in the decision on that question which results in the issuance of patent to the wrong person is remediable in equity. *Howe v. Parker*, 111 C. C. A. 466, 190 Fed. 738. See also *Sousa v. Pereira*, 64 Pac. 90; *Copley v. Dinkgrave*, 25 La. Ann. 577; *Marks v. Martin*, 27 La. Ann. 527, *aff'd* 97 U. S. 345.

We turn now to the contention of appellant that the act of August 7, 1846 (9 Stat. 66), was not prospective in operation and did not cede lands of the United States not then within the boundaries of Tennessee to that State and was ineffectual to release to the State the lands in question.

The full text of this act is as follows:

That the United States hereby release and surrender to the State of Tennessee the right and title of the United States to all lands in the State of Tennessee, lying south and west of the Congressional reservation line in said State, which may yet remain unappropriated, and further release and transfer to said State of Tennessee the proceeds of such of said lands as may have been sold by said State, not heretofore paid over to the United States, nor deposited subject to the order or use of the United States, under the authority of the act of Congress of the eighteenth February, eighteen hundred and forty-one, entitled "An Act to amend an Act entitled 'An Act to authorize the State of Tennessee to issue Grants and perfect Titles to certain Lands therein described, and to settle the Claims to the vacant and unappropriated Lands within the same,' passed the eighteenth Day of April, one thousand eight hundred and six." This surrender and transfer is upon the express condition that the State of Tennessee shall, out of the proceeds of said lands, set apart and apply forty thousand dollars towards the establishment and support of a college at Jackson, in the county of Madison, in the State of Tennessee, if the proceeds of the sales of said lands shall amount to so much; and if the

aggregate amount of said sales (not paid over nor deposited as aforesaid) shall not amount to the said sum, then whatever sum smaller than forty thousand dollars they may amount to, in accordance with the provisions contained in an act of the General Assembly of said State, passed in the year eighteen hundred and thirty-eight, being chapter one hundred and seven, section eight, and in accordance with the desire expressed by said General Assembly, in their certain memorial to Congress, passed December four, eighteen hundred and forty-five: *Provided, nevertheless*, That the release herein provided for to the said State of Tennessee of said lands shall be in full satisfaction for any and all services rendered and expenses incurred by said State, or the authorities thereof, in the management, disposal, or administration, of said public lands, and as agent or agents of the United States, in virtue of the provisions of the act entitled "An Act to amend an Act entitled 'An Act to authorize the State of Tennessee to issue Grants and perfect Titles to certain Lands therein described, and to settle the Claims to the vacant and unappropriated Lands within the same,' passed the eighteenth February, eighteen hundred and forty-one:" *And provided also*, That all the said lands the release of which is herein provided for, and the proceeds thereof, shall be and remain subject to all the same claims, incumbrances, and liabilities, in relation to "North Carolina land warrants," or other claims of North Carolina, as the same would or could be subject to as regards the United States, if the same were not so as aforesaid released.

The report of the Committee on Public Lands (H. R. 140, 29th Cong., 1st sess., H. Repts. of Com's, vol. 1, No. 134) throws light on the reasons and circumstances that motivated the cession. The report recites the cession of all the lands constituting the State of Tennessee to the United States in 1789 by the State of North Carolina charged with certain reservations respecting the satisfaction and perfection of military land warrants; that—

In 1796, Tennessee was admitted into the Union and "*declared to be one of the United States of America, on an equal footing with the original States in all respects whatever*;" but no reservation respecting the right of Congress to dispose of the public lands within her limits, or exempting them from taxation by the State, was introduced into the act of admission. In consequence of which, Tennessee soon after set up a claim to the vacant and unappropriated lands within her limits, contending that the right to dispose of the soil was incident to the sovereignty of the State, and that it had passed to the State upon her admission. In this situation of things, a conflict of rights ensued between the United States, the State of Tennessee, and the State of North Carolina. Congress claimed the right to dispose of the lands, subject to the charges imposed by the act of cession; North Carolina claimed the right under that act to issue grants and perfect titles to lands in satisfaction of military claims; and Tennessee denied the existence of these rights, and insisted upon a counter one to tax and dispose of the lands at her discretion. To adjust this dispute, an act of Congress was passed, April 18, 1806, which, by the assent of North Carolina and Tennessee, became a compact between the three parties. This act adjusted the dispute between the United States and Tennessee, by ceding to the latter all of the vacant lands lying east and north of a line thereby established, (known as the congressional reservation line,) and reserv-

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ing to the United States all of those lying west and south of that line; and, in like manner, the dispute with North Carolina, by affirming her lien upon all the lands, subject to certain regulations for the satisfaction of military claims, and by investing the State of Tennessee with full power and authority to perfect titles to the lands charged with such claims. (See Laws United States, vol. 4, page 29.)

that title to a large part of the lands had been perfected; that by an act of Congress in 1841 the State was constituted an agent to dispose of the vacant unappropriated lands under certain conditions and limitations which are set forth; that the State had discharged its duty as trustee, but still remained the agent and trustee of the United States as to the lands undisposed of.

As to the question whether it was expedient to cede the lands to the State, the Committee observed that the lands had been on the market for more than a half century; that they had been "culled and picked;" that the remnants left consisting "of angular and misshapen fractions cutting upon barren hills and bold mountains, or otherwise being situated in unwholesome and irreclaimable swamps, can hardly be worth the trouble and expense which the general government would have to incur in disposing of it." The Committee further observed that wisdom and policy dictated the duty of allowing every citizen a permanent home free from the existing restrictions as to their disposal and questioned whether by the retention of the land by the United States, subject to such restrictions, the State was admitted on an equal footing with other States in all respects whatsoever, and went on to say—

These causes of complaint, serious in the estimation of many, would be in a great degree obviated by the introduction of such a change in the present land system as would speedily pass the public lands now unproductive into private possession and use. Such a change would be conducive to the public interests in many respects; it would quiet the jealousy and apprehension of many of the States; it would tend to render compact the settlements upon the public lands; would extend the limits of agricultural labor; augment the wealth of the country; and thus improve the revenues of the General and State governments.

and that it did not feel authorized to enjoin any specific application of the lands, but to cede them in absolute right to the State.

At the time of the passage of the bill, Mr. McClernand in charge of the bill, recited the history of the lands and reasons for the measure as stated in the report and recommended its passage on the ground of economy (Cong. Globe, vol. 15, 1st sess., 29th Cong., p. 1199).

The appellant calls attention to the Act of the Legislature of Tennessee, chapter 20, of the acts of 1847, providing for the disposal of the "vacant unappropriated lands" lying south and west of the Congressional Reservation Line and to the recent case of *Clements et al.*

v. Riegel et al., decided by the Supreme Court of Tennessee, a copy of the opinion being furnished, in which the court following the ruling in *Stockley v. Cissna*, 119 Fed. 812, held that said act was not prospective and did not apply to land in the bed of the Mississippi River; that at the date of the act the lands were not "vacant unappropriated lands" within the meaning thereof, and it is contended that as this act used the same language (presumably meaning the words last quoted) as the Congressional Act of Cession, the latter is likewise prospective in operation, and applied only to the lands granted to Tennessee.

In *Stockley v. Cissna*, the Federal court's statement on this subject, which is quoted with approval by the State Supreme Court in *Stockley v. Cissna*, is as follows:

The lands included in this grant were, at the time of the enactment of the law under which the grant was issued, plainly and clearly not within the terms of the law. They were not unoccupied, vacant lands within the meaning of the Tennessee act, as determined by the highest court of that state. They have since become dry land, capable of occupation, by a most extraordinary natural phenomenon—the sudden abandonment by a great river of its natural channel for a new and shorter one. The situation is one which could not have been reasonably contemplated by the lawmaker when providing for the ordinary vacant lands belonging to the public domain. The lands in question were not at the date of the act of 1847 within the meaning and purview of the makers of the law, because it was the policy and purpose of the state to reserve for the public use the beds of such navigable rivers. * * * The dry river bed is public property held by the state for public purposes, and some further legislation by the state is necessary before such property will become open to private ownership. There was no such state of evidence as would justify the court instructing the jury that the premises included in the grant below low-water mark of 1824 was an addition by accretion to the lands granted prior thereto and bounded by the river, or that the change which had occurred had been so sudden as not to be regarded as an accretion; but in either case the grant was ineffectual to give title to the plaintiff. There was, therefore, no error in the instruction to find against the plaintiff.

It does not necessarily follow that the policy and purpose of the State in providing for the disposition of the granted lands was the same as that of the Congress in granting them.

From the history of the congressional act above set forth, it is believed to have been the intent and purpose of Congress in order to settle all controversy with the State, and to rid the Federal Government of all administration of the remnants of the public lands in the State, whose poor quality and then little value did not warrant their administration and disposition under the then public land system, to divest itself of all ownership and jurisdiction over the public lands in Tennessee at once and forever. It is to be presumed that Congress knew that the Mississippi River was the western boundary of Ten-

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nessee and that the changes in the channel might be affected by floods and it seems improbable, though the act of cession at the time of its enactment passed the title only to the lands ceded by North Carolina, that it was the intention that the United States was to retain its ownership and apply its system of disposition under the public land laws to such small fragments of public lands in Arkansas that were washed away by gradual changes in the channel of the river, but subsequently reappeared in the State of Tennessee.

The appellant inquires, "if it is not Government land by reason of its re-appearance after submergence, then where does the title rest?" It is believed that the proper answer is that it is a question that may be and should be settled in the courts.

For the reasons above stated it is held that it has not been satisfactorily shown that either the lands in Arkansas or Tennessee are public lands subject to disposition under the public land laws, and there was no sufficient warrant for surveying any part of them as such. The acceptance of the official plat and the filing thereof as a basis for disposition is revoked, and the entry should be canceled in its entirety. As modified, the decision of the Commissioner is affirmed.

Affirmed as Modified.

FRANKLIN GEORGE FOX*Decided December 4, 1942***HOMESTEAD ENTRY—FEDERAL EMPLOYEE.**

Foreman of Civilian Conservation Corps, cooperating with Land Office on Alaskan Fire Control Project, made homestead entry and proper improvements prior to his death. *Held*, not to have been an employee of the Land Office so as to prohibit his interest in the purchase of public land within the meaning of Rev. Stat. sec. 452 (43 U. S. C. sec. 11).

CHAPMAN, Assistant Secretary:

On May 22, 1940, Franklin George Fox, a World War veteran, made an application for a homestead entry on the E $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 23, T. 13 N., R. 4 W., S. M., near Anchorage, Alaska, containing 30 acres of land classified as nonoil and nongas. Final proof statements on October 11, 1941, are that during the fall of 1940 and the spring of 1941, Fox built and furnished a four-room house; built a pump house and 250 yards of road; cultivated a garden plot; died suddenly on October 9, 1941.

On February 4, 1942, the Assistant Commissioner held the entry for cancelation on the ground that it was erroneously allowed be-

cause the entryman was employed under the supervision of the Commissioner of the General Land Office from April 1, 1940, until his death and was thereby prohibited from entering or becoming interested, directly or indirectly, in any of the public lands. He did not state in what capacity he found Fox to be employed.

The decision is appealed by the widow and the daughter. The latter states that her father was not employed in the Anchorage Land Office; that he was foreman of the Civilian Conservation Corps in the district. Land Office records show that Fox was transferred from the Forest Service April 1, 1940, when he became a Civilian Conservation Corps foreman. On May 1, 1940, he became Senior Project Superintendent. The Civilian Conservation Corps was, at this time, cooperating with the Land Office on the Alaskan Fire Control Project.

The law prohibits "officers, clerks, and employees in the General Land Office" from directly or indirectly purchasing or becoming interested in the purchase of any of the public land, and violators of this provision shall be removed from office (Rev. Stat. sec. 452, 43 U. S. C. sec. 11). The Department has ruled that the disqualification to enter public lands extends to employees in any of the branches of the public service under the control and supervision of the Commissioner in the discharge of his duties relating to the survey and sale of public land (43 CFR 210.17). The question is whether Fox is such an employee.

The Civilian Conservation Corps, created June 28, 1937 (50 Stat. 319, 16 U. S. C. sec. 584), was transferred on July 1, 1939, to the Federal Security Agency in accordance with Reorganization Plan No. I, part 2, secs. 201 and 207, which provide that its functions shall be administered by the Director of the Civilian Conservation Corps under the direction and supervision of the Federal Security Administrator (5 U. S. C. sec. 133t). The Civilian Conservation Corps was established for the purpose of providing employment as well as vocational training for youthful citizens and veterans (16 U. S. C. sec. 584). "Final" and "complete" authority in the functioning of the Corps, including the allotment of funds to cooperating agencies and departments was given to the Director (16 U. S. C. sec. 584a) who was further authorized to provide for the employment of the Corps on works of public interest including those on public lands and projects belonging to States and political subdivisions thereof (16 U. S. C. sec. 584b). The Director, and under his supervision, the heads of other Federal departments or agencies cooperating in the work, were authorized to appoint civilian personnel necessary for the efficient and economical discharge of these

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functions (16 U. S. C. sec. 584d), and to enter into such cooperative agreements as were necessary for the utilization of services and facilities of States and political subdivisions (Executive Order No. 7677-A, as amended; see footnote, 16 U. S. C. sec. 584k). The Chief of Finance, War Department, was directed to act as fiscal agent of the Director (16 U. S. C. sec. 584j). This enumeration shows that primary control of the Corps and all its activities was vested in the Director and that any appointment of personnel by persons other than the Director was under his supervision and was merely a matter of selection. Appropriations for activities of the Civilian Conservation Corps expendable during the 1940 and 1941 fiscal years were carried in the Independent Offices Appropriation Act, 1940, and in the Labor-Federal Security Appropriation Act, 1941 (53 Stat. 524, 529, and 54 Stat. 574, 581). This would further indicate that Fox was an employee of the Civilian Conservation Corps, a separate agency under the primary control of the Director, subject to general supervision and direction of the Federal Security Administrator, and was paid from funds appropriated to that agency.

The question of the status of an employee of a Government agency cooperating with another organization or political subdivision has arisen before. It has been held that Federal Emergency Relief Administration employees cooperating in a city project and working under the city's foreman (*Shelton v. City of Greeneville*, 169 Tenn. 366, 87 S. W. (2d) 1016), or paid by check drawn by the State treasurer from funds allotted by the Federal Emergency Relief Administration (*Manning v. State*, 123 Conn. 504, 196 Atl. 777), are not employees of the city or State. In line with this is an opinion of the Department, 58 I. D. 146, *supra*, which holds that personnel of the Office of Civilian Defense in Hawaii who are paid out of a \$15,000,000 fund allocated from the President's Emergency Fund to the Secretary of the Interior for protection, care and relief of the civilian population in that territory, are "Federal" rather than "Territorial" employees because the Governor of Hawaii, in expending these funds and appointing personnel, acts merely as the officially designated agent of the Secretary.

In the message of the President transmitting Reorganization Plan No. I to Congress, the Civilian Conservation Corps is referred to as a coordinating agency which supervises work carried on with the cooperation of several regular departments and independent units of the Government (see footnote, 5 U. S. C. sec. 133t). It would be a strained construction which would consider Civilian Conservation Corps personnel engaged in these cooperative undertakings, as employees of the department, State or agency controlling the par-

ticular project. In line with its character as a coordinating and cooperating agency, some power of selection of persons to supervise the project and control of funds necessarily must be exercised outside the immediate supervision of the Director.

The selection of Fox in the exercise of this authority does not bring him within the prohibition of the statute. Rev. Stat. sec. 452 is not as broad as Rev. Stat. sec. 2078 (25 U. S. C. sec. 68), which provides that no person "employed in Indian affairs" shall have any interest or concern in any trade with the Indians except for and on behalf of the United States. Under the latter statute, an attorney, hired by the Department of Justice to prosecute suits relating to Indian lands, was properly precluded from bidding for such lands (*Ewert v. Bluejacket*, 259 U. S. 129). Nor are the duties of Fox shown to be under the control and supervision of the Commissioner in the discharge of his duties relating to the survey and sale of public land as set forth in the regulation of September 15, 1890 (43 CFR 210.17). The case of *Herbert McMicken et al.*, 10 L. D. 97; 11 L. D. 96, which was the basis for this regulation, can be readily distinguished in that McMicken was an employee in the office of the surveyor-general and paid from funds contained in the general appropriations for the Department of the Interior.

Rev. Stat. sec. 452 is penal in that a violation is ground for discharge. Such statutes should be strictly construed but not, of course, to the extent that construction defeats the obvious purpose of the legislative body. *United States v. Lacher*, 134 U. S. 624, 628. The rule of strictness properly allows words to have a full meaning in order to promote fully the policy and the objects of the legislation. *United States v. Hartwell*, 6 Wall. 385. This full meaning has been given the word "employees" as used in Rev. Stat. sec. 452 in the cases of *Waskey v. Hammer*, 223 U. S. 85; *Prosser v. Finn*, 208 U. S. 67; and *United States v. Havenor*, 209 Fed. 988, dealing with entries of a mineral surveyor, a special agent, and a deputy mineral surveyor, respectively. They have properly established the rule that the prohibition embraces employees of the Land Office without exception. Fox is not shown to have been an employee of that office.

The decision of the Commissioner is accordingly

Reversed.

EFFECT OF THE RAMSPECK ACT OF NOVEMBER 26, 1940, UPON SUBSEQUENT APPOINTMENTS OF FIELD PERSONNEL

Opinion, December 17, 1942

FEDERAL EMPLOYEES—FIELD APPOINTMENTS—CIVIL SERVICE STATUS—RAMSPECK ACT OF NOVEMBER 26, 1940.

Title I of the Ramspeck Act of November 26, 1940 (54 Stat. 1211, 5 U. S. C. sec. 631(a) *et seq.*), restored to the President the general authority granted under the Civil Service Act of 1883 to bring into the classified civil service excepted positions by Executive order, provided employees holding such positions meet specified qualifications. The President exercised this authority by issuing Executive Order No. 8743, on April 23, 1941, covering into the classified civil service "all offices and positions in the executive civil service of the United States," with certain specific exceptions.

FEDERAL EMPLOYEES—POSITION AND SALARY—CLASSIFICATION STATUS—RAM- SPECK ACT OF NOVEMBER 26, 1940.

Title II of the Ramspeck Act of November 26, 1940 (54 Stat. 1212, 5 U. S. C. sec. 631 *et seq.*), is unconnected with Title I of the act. It requires the issuance of an Executive order to give it effect. It permits the President to extend the position and salary classification act to field positions, with certain exceptions, not at the time of its passage covered by the Classification Act of 1923. Until such time as an Executive order issues under Title II, the procedure theretofore prescribed for filling field positions, so far as salary or compensation rates or any limitations thereon are concerned, still is in effect.

GARDNER, *Solicitor*:

I have reviewed Mr. Harvey's memorandum of November 19 and the attachments from the Bonneville Power Administration, transmitted by your [First Assistant Secretary] memorandum of November 20, concerning a proposed appointment to the position of General Counsel in the Bonneville Power Administration, and the effect, if any, upon such an appointment of the Ramspeck Act (act of November 26, 1940; 54 Stat. 1211, 5 U. S. C. sec. 631(a) *et seq.*). I concur in the views expressed by Mr. Harvey.

Title I of the Ramspeck Act provides that "notwithstanding any provisions of law to the contrary" the President is authorized under certain circumstances and conditions to cover into the classified civil service employees of the agencies of government who were at the time of its passage outside the merit system. A review of the legislative history of the act discloses that Title I undertakes to do but one thing, and that is to restore to the President the general authority granted under the Civil Service Act of 1883 to bring into the classified service excepted positions by Executive order, providing the employees holding those positions qualify in a specified manner.

The President exercised the authority granted under Title I by issuing Executive Order No. 8743, on April 23, 1941, covering into the classified civil service "all offices and positions in the executive civil service of the United States," except (1) those that are temporary, (2) those expressly excepted from the provisions of section 1 of the Ramspeck Act, *supra*, (3) those excepted from the classified service under Schedules A and B of the civil-service rules, and (4) those which already had a classified status. Only exceptions (1) and (3) apply to the Bonneville Power Administration. Under Schedule A-VIII-24, as amended by Executive Order No. 9004, dated December 30, 1941, the Administrator and one Assistant Administrator are expressly exempted from examination under section 3 of Civil Service Rule II. The position of Chief Counsel is not exempted for any reason from the provisions of this title. The effect of Executive Order No. 8743 is to confer upon Bonneville Power Administration employees meeting the requirements of Title I all of the benefits and privileges of regular civil-service employees.

Title II of the Ramspeck Act deals with the Classification Act (act of March 4, 1923, 42 Stat. 1488, 5 U. S. C. sec. 661, *et seq.*), and has nothing to do with Title I. Title II also requires the issuance of an Executive order to give it effect. The only thing it does is to give permission to the President to extend the salary classification act to field positions not at the time of its passage covered by that act, with certain exceptions. The position of Chief Counsel of the Bonneville Power Administration is not among the exceptions. Until such time as an Executive order issues under Title II, extending the provisions of the Classification Act to field positions of the Bonneville Power Administration, the procedure theretofore prescribed for filling such positions, so far as salary or compensation rates or any limitations thereon are concerned, still is in effect.

INTERPRETATION OF ADVANCE ROYALTY PROVISIONS IN INDIAN LEASES

*Opinion, December 24, 1942**

RESTRICTED INDIAN LANDS—LEASES—INDIAN OIL AND GAS LEASE FORMS—
ADVANCE ROYALTY PAYMENTS—MINIMUM PAYMENTS.

Advance royalty payments are not minimum payments under lease form A approved April 20, 1908 (amended February 6, 1911 and June 29, 1911) used by the Five Civilized Tribes Indian Agency prior to 1925, nor under lease form 5-154h used prior to 1925 by Indian agencies other than the Five Civilized Tribes.

* Letters and memoranda referred to in this opinion may be found in the files of the Solicitor's Office.

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Under lease form 5-154h, adopted December 24, 1924, and used by all Indian agencies in Oklahoma (except Osage) from 1925 to 1933, the advance royalties constitute minimum payments required to be made until such time as royalties on production exceed the advance royalty payments.

The obligation of the lessees to make payment of advance royalties under leases executed on form 5-154h, adopted December 24, 1924, is not limited to the fixed or 10-year period but continues during subsequent periods of the lease subject to termination only by the completion of a well or wells producing oil or gas in quantities sufficient to return to the lessor an income in excess of the advance royalty payments.

Neither lease form A, used by the Five Civilized Tribes Indian Agency prior to 1925, nor lease form 5-154h, used prior to 1925 by Indian agencies other than the Five Civilized Tribes, requires the lessee to resume the payment of advance royalties after producing wells on the leaseholds cease to produce.

Under lease form 5-154h, in use by all Indian agencies in Oklahoma except Osage from 1925 to 1933, the lessee is obligated to resume the payment of advance royalties when the producing well or wells cease to produce only during the fixed period of 10 years.

Advance royalties must be paid in addition to the prescribed rental for a non-utilized gas well during the fixed period of the lease and any extension thereof by payment of the non-utilized gas rental.

Where a lease, which has been continued in force after the fixed 10-year period by production returning stipulated royalties in excess of advance royalties, is assigned during a year in which production ceases or declines to the extent that the production royalties are less than the advance royalties, no question of apportionment of advance royalties as between the assignor and assignee can arise because the obligation to make the advance royalty payments had previously terminated and is not revived by cessation or decline of production.

GARDNER, *Solicitor*:

You [Secretary of the Interior] submitted on January 17, 1941, a request for an opinion on a number of questions concerning the interpretation of advance royalty provisions contained in various lease forms under which leases now in force have been issued.

These questions will be taken up in order:

1. Is advance royalty required as a minimum payment under the following lease forms when the leasehold is producing oil or gas?

- (a) Lease form A approved April 20, 1908 (amended February 6, 1911 and June 29, 1911), used by the Five Civilized Tribes Indian Agency prior to 1925;

- (b) Lease form 5-154h, used prior to 1925 by Indian agencies other than the Five Civilized Tribes;

- (c) Lease form 5-154h, adopted December 24, 1924, and used by all Indian agencies in Oklahoma (except Osage) from 1925 to 1933.

For convenience in answering the foregoing questions the lease forms involved will be referred to as forms (a), (b) and (c). Forms (a) and (b) provide for a period of 10 years and as long thereafter as oil and gas shall be found in paying quantities, a royalty on production of one-eighth of the gross proceeds of all crude oil extracted and a flat royalty of \$300 per annum for each gas-producing well. Form (c) provides for a period of 10 years and extensions beyond that period on certain conditions, one of which is the production of oil and gas in paying quantities, and also provides for a royalty of one-eighth of the proceeds or value of the oil and gas produced. All three forms contain what is known as a drill or pay clause, i.e., that a well must be drilled or rental paid in lieu thereof at the rate of \$1 per acre per annum. In addition, all three leases contain a provision, upon which the answers to the above questions turn, requiring the payment of what is termed "advance royalties." In forms (a) and (b) this provision is couched in practically identical terms. In form (b) it reads (sec. 3):

Until a producing well is completed on said premises the lessee shall pay, or cause to be paid, to the officer in charge, for the use and benefit of the lessor, as advanced royalty, from the date of the approval of this lease, fifteen cents per acre per annum, in advance, for the first and second years; thirty cents per acre per annum, in advance, for the third and fourth years; seventy-five cents per acre in advance, for the fifth year; and one dollar per acre per annum, in advance, for each succeeding year of the term of this lease; it being understood and agreed that such sums of money so paid shall be a credit on stipulated royalties for the year for which the payment of advanced royalty is made, and the lessee hereby agree that said advance royalty when paid shall not be refunded to the lessee because of any subsequent surrender or cancellation thereof; nor shall the lessee be relieved from obligation to pay said advance royalty annually when it becomes due, by reason of any subsequent surrender or cancellation of this lease.¹

Form (c) was adopted in 1924 as a uniform type of lease designed to replace forms (a) and (b) and all other forms used in leasing allotted Indian lands for oil and gas mining purposes.² Section 5, which deals with the payment of advance royalties, reads:

Commencing from the date of the approval of this lease, and continuing until lessee shall have drilled a producing well on said land, lessee shall pay to the officer in charge, for lessor, as advance royalty, 15 cents per acre per annum in advance for the first and second years, 30 cents per acre per annum in advance for the third and fourth years, 75 cents per acre per annum in advance for the fifth year, and \$1 per acre per annum in advance for each

¹ Form (a) differs slightly from form (b) in providing that the advance royalties shall be credited on the stipulated royalties without stating that the credit is for the year for which the payment of advance royalty is made.

² See the letter signed by the Commissioner of Indian Affairs November 21, 1924, approved by the Assistant Secretary of the Interior December 24, 1924.

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succeeding year during the term of this lease: *Provided*, That should the producing well or wells on said land cease to produce during the fixed term hereof, then at the next succeeding advance royalty paying day, lessee shall resume the payment of advance royalty. * * *

Lease forms (a) and (b) provide in section 8 that the lease shall be subject to the regulations of the Secretary of the Interior then or thereafter in force, which regulations were to become "a part and condition" of the lease save that "no regulations made after the approval of this lease, affecting either the length of term of oil and gas leases, the rates of royalty or payment thereunder, or the assignment of leases, shall operate to affect the terms and conditions of this lease." Lease form (c) provides that during the period of supervision by the Secretary of the Interior, the lease "shall be subject to the supervisory regulations of said Secretary." With the record is a statement prepared by the Geological Survey which contains excerpts from the applicable regulations in force during the periods here involved. An examination of this statement discloses that the regulations in force prior to the adoption of form (c) in 1924 follow closely the language of the lease forms then in force. They contained no specific provision indicating that the advance royalty payments were to be regarded as minimum payments. However, after the adoption of a uniform type of lease in 1924, the general regulations prescribed under the act of March 3, 1909 (35 Stat. 781, 783, 25 U. S. C. sec. 396), were, on July 7, 1925, revised to conform to the provisions of the new lease form. On the same date, special regulations governing leases on lands allotted to Indians of the Five Civilized Tribes, prescribed under the act of May 27, 1908 (35 Stat. 312), were revised to conform to the new lease form. The revised regulations provided in both cases that the advance royalties were to be paid "until the royalties on production exceed the advance royalty."³ Subsequent revisions of the regulations were to the same general effect.⁴ The object of these later regulations undoubtedly was to fix the advance royalty as the minimum to be paid so that the lessee would be obligated to continue to make the advance royalty payments notwithstanding the completion of a producing well at least until the time that the production royalties exceeded the advance payment.

In my opinion, the revised regulations are without application to preexisting leases executed on forms (a) and (b). Under the plain

³ Section 14, Regulations Governing the Leasing of Restricted Allotted Indian Lands for Mining Purposes, approved July 7, 1925; section 33, Regulations Governing Leasing and Removal of Restrictions on Land of Members of the Five Civilized Tribes, approved July 7, 1925.

⁴ 25 CFR 183.19 and 189.14.

language of these lease forms advance royalties are not required to be paid under producing leases. The language is (sec. 3, above) that the advance payments are to be made "until a producing well is completed." This is a definite time limitation operating to terminate the obligation of the lessee to make the payment immediately upon the completion of a producing well. Termination of the obligation is not conditioned on the capacity of the well nor upon the amount in royalties it may produce so long as it does produce royalties. In oil and gas leases, the word "royalty" is used to denote the interest or share of the lessor in oil and gas production.⁵ Accordingly, the term "advance royalty" implies in itself that the payments so characterized were to be made only in advance of production. Thereafter, the obligation of the lessee would be met by payment of the stipulated royalties on production. Under a provision in lease form (a) all advance royalties paid up to the date of completion of a producing well are refunded to the lessee by the process of crediting the advance payments on the production royalties.⁶ Under lease form (b) the credit is allowed only for the year for which the payment of advance royalty is made. Both provisions forcibly illustrate that payment of the advance royalties was to cease with production. The conclusion is inescapable that this type of lease imposed no obligation upon the lessee to make any payment of advance royalty after a producing well has been completed on the leased premises. While the lease provides that subsequent regulations shall become a part of the lease (sec. 8), this provision is subject to the express limitation that no such regulations made after approval of the lease shall affect its terms with respect to the rates of royalty or payment thereof. The later revised regulations as applied to these leases, which leases contain no requirement for the payment of advance royalties after a producing well has been completed, would clearly have the forbidden effect.

The administrative practice and interpretation with respect to lease forms (a) and (b) are in general accord with the foregoing view. By letter dated November 25, 1940, the Director of the Geological Survey reports that the oil and gas supervisor has not computed or charged advance royalties as a minimum requirement against the accounts of producing leases issued on form (a), and that this accords with the practice followed by the Five Civilized Tribes Agency. An Indian Office letter dated July 18, approved July 22, 1924, holds that advance royalties under this type of lease are not to be considered minimum royalties. Another Indian Office letter, dated May 27,

⁵ Summers, *Oil and Gas*, sections 571, 572.

⁶ See telegram November 11, 1942, from Superintendent Landman to Secretary of the Interior.

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approved May 31, 1935, took the position that under a lease on form (b) the advance royalty payments represented minimums and that they should be made in advance as required until the production royalties exceeded the advance royalties. In three subsequent letters, however, approved on the respective dates of July 26, 1934, December 31, 1935, and July 15, 1936, the Department refrained from collecting advance royalties above production royalties on the ground that the liability of the lessee for this amount was too doubtful.

With respect to lease form (c), the situation is quite different. Since the adoption of that form, the Department has consistently ruled that advance royalty payments required by section 5 are minimum payments to be continued until the royalties on production exceed the advance royalties. See Indian Office letters approved June 6, 1932, and July 26, 1934, and *The Texas Company*, decided September 26, 1941, 57 I. D. 378. These decisions are in my opinion correct.

As hereinbefore pointed out the revised regulations plainly fix the advance royalty as the minimum to be paid so that the lessee is obligated to make the advance royalty payment until such time as the production royalties exceed the advance payment. It is true that the lease form provides (sec. 12) that the provisions of the lease embody all of the material and substantial terms and conditions of the contract between the parties and that during the period supervision is retained by the Secretary of the Interior the lease shall be subject to the supervisory regulations of the Secretary. But the revised regulations were in full force and effect at the time all leases on this form were executed and approved. As pointed out in the decision in the case of *The Texas Company, supra*, these regulations were prescribed under authority of Congress and have the force and effect of law. Accordingly, they must be deemed to be a part of all leases thereafter executed to the same extent as if written therein. The declaration in section 12 thus cannot be regarded as intended to exclude the application of such preexisting regulations but rather to preclude the making of any change in the material and substantial terms and conditions of the lease by regulations adopted subsequent to the execution and approval of the lease.

It should be pointed out, moreover, that the lease and regulations are not in conflict. Section 5 of the lease provides for the payment of advance royalty until the lessee shall have drilled "a producing well" on the premises. The regulations define and explain what is meant by "producing well." Reading the lease and regulations together, as they must be, it becomes plain that a well, to be producing within the contemplation of section 5, must produce in quanti-

ties sufficient to return to the lessors in stipulated royalties an income in excess of the advance royalty. At that time and at that time only may the lessee discontinue the payment of advance royalty.

Questions 1(a) and 1(b) are answered in the negative. Question 1(c) is answered in the affirmative.

2. If the answer to questions 1(a), 1(b), or 1(c) is in the affirmative, is the requirement—

(a) Applicable both to the fixed and subsequent periods during which the lease is continued in force by production; or

(b) Limited only to the fixed (or 10-year) term, and

(c) Are such payments to be resumed at any time if production on the lease terminates?

As I have answered questions 1(a) and 1(b) in the negative, it is necessary to consider questions 2(a) and 2(b) only under lease form (c). I have already concluded that under section 5 of this form the term "producing well" means a well producing in such quantities that the production royalties exceed the advance royalty. After such a well has been established, advance royalty payments are no longer required either during the fixed or subsequent periods of the lease because the obligation of the lessee is met by the payment of production royalties. As a well producing in quantities insufficient to return production royalties in excess of advance royalty is not a producing well within the meaning of section 5 of the lease, the advance royalty payments must be continued under that section "during the term of the lease." The term of the lease as used in the quoted provision plainly includes the fixed term of 10 years and any extension of that term beyond that period by fulfillment of the conditions specified in the habendum clause of the lease (sec. 2). My answer to questions 2(a) and 2(b) accordingly is that the advance royalty payment is required as a minimum both during the fixed and subsequent periods of the lease until such time as the lessee shall have drilled a well producing in quantities sufficient to return to the lessors an income in stipulated royalties in excess of the advance royalty.

Question 2(c) applies to all three types of leases and will be answered accordingly. This question, which deals with the resumption of advance royalty payments after production on the lease terminates, is answered by the provisions of the respective leases. Lease forms (a) and (b) do not provide for the resumption of advance royalty payments. The regulations, subsequently adopted, in so far as they purport to require that advance royalty payments be resumed, would run afoul of the provision in section 8 of these forms that no regula-

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tion made after the date of the lease shall affect the terms of the lease with respect to rates of royalty or payments thereunder.

As to form (c), specific provision is made in section 5 for the resumption of the payment of advance royalties when the producing well or wells cease to produce. This provision is applicable in terms only during the fixed period. Cessation of production after the fixed term would, of course, terminate the lease unless other conditions specified in the habendum clause (sec. 2) for extension of the lease beyond the fixed period are met.

3. Are advance royalties under section 5 of lease issued on Form 5-154 required on a nonproducing lease which is being maintained in force and effect by payment of non-utilized gas well rental under section 4 of such lease.

This question, it appears, has arisen in connection with a lease on form (c) held by the LeFlore County Gas and Electric Company on 420 acres of land allotted to Nellie Jones, a full-blood Choctaw Indian. The lease was approved on September 19, 1927. Accordingly, its 10-year term expired September 18, 1937. The company drilled one well on the lease capable of producing a small quantity of gas. No gas has been produced from the well. Commencing in 1934 and continuing until 1940 the company has paid each year in advance \$100 as rental for the retention of gas-producing privileges in the non-utilized well. The payments were made under section 4 of the lease and, the company contends, such payments were made in conformity with an understanding had with officials of the Five Civilized Tribes Agency that the payment of \$100 per annum satisfied all obligations of the lessee under the lease. On June 22, 1940, the Assistant Superintendent of the Five Civilized Tribes Agency made demand on the company for payment of \$1,920 representing the advance royalty for six years commencing in 1934 at \$1 per acre per annum (the rate specified in the lease for the sixth and succeeding years of the lease term) less the rental payments of \$100 per annum which the lessee had made for retention of gas-producing privileges in the non-utilized well. After a hearing had been accorded the company on this demand, the Assistant Superintendent declined to vacate his demand for additional payments. The company appealed. The brief and argument on appeal set forth three grounds: First, that the decision is contrary to and in the face of the plain provisions of the lease; second, that the ruling of the Superintendent will discourage development of minerals; and, third, that the ruling is inequitable and unjust because the company was led to believe that the payment of \$100 per year was all that would be required. The second and third grounds are pleas for administra-

tive relief rather than arguments in support of the legal rights of the company under the lease. I shall, therefore, address myself only to the first ground.

Section 5 of this form of lease (form (c)) requires, as we have seen, that advance royalties be paid until the lessee shall have drilled a producing well on the leased land. Section 4, after providing for a royalty of 12½ percent of the value of the gas in the field where produced, contains this further provision:

* * * Failure on the part of the lessee to use a *gas-producing* well which cannot profitably be utilized at the rate herein named shall not work a forfeiture of this lease so far as it relates to mining oil, but if the lessee desires to retain gas-producing privileges he shall pay a rental of \$100 per annum in advance, calculated from the date of the discovery of gas on each gas-producing well, the gas from which is not marketed nor utilized other than for operations under this lease. * * * [Italics supplied.]

Where the only well drilled on the premises is a non-utilized gas well on which the lessee is paying the gas rental of \$100 per annum for the retention of gas-producing privileges, the question is whether the condition that would terminate the lessee's obligation to make advance royalty payments has been met. To meet this condition such a non-utilized gas well must be held to be a producing gas well within the meaning of section 5. A non-utilized gas well is not in my opinion such a producing well. Section 5 plainly contemplates actual production of either oil or gas on which the stipulated royalties of 12½ percent are paid. In other words, the well must produce either oil or gas in paying quantities. This is plainly indicated by the requirement in section 5 that the advance royalties be credited on the stipulated royalties for the year for which the payment of the advance royalty is made. The payment made on a non-utilized gas well is in no sense a royalty on production. It is a rental exacted for the privilege of retaining gas-producing privileges. The tender of such a payment is in itself an admission that the well is not producing in paying quantities (Sol. Op. April 19, 1934, 54 I. D. 422, 425). As the lease contains no provisions for crediting advance royalties on rental payments, the rental of \$100 on such a well is required not in lieu of, but in addition to, the advance royalty payments required by section 5.

The demand of the Assistant Superintendent of the Five Tribes Agency covers advance royalty payments for three years of the fixed 10-year period of the lease and subsequent years down to the date of demand during which subsequent period the lease was continued in force by the payment of a non-utilized gas well rental of \$100

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per annum.⁷ Since paragraph 4 refers to the payment on a non-utilized well as a rental, the words "gas royalties" in the habendum clause are obviously mistakenly used for "gas rentals." Under the provisions of the lease the lessee's obligation to make the advance royalty payments is not confined to the fixed term of 10 years. In the absence of actual production returning stipulated royalties in excess of the advance royalty, the payments are required to be made throughout the "term of the lease." As already stated in the answers to questions 2(a) and 2(b), this plainly embraces the fixed term of 10 years and any extension of that term by operation of the habendum clause. In urging a contrary interpretation, the LeFlore County Gas and Electric Company places reliance on the provision in section 5 to the effect that "should the producing well or wells on said land cease to produce during the *fixed term* hereof, then at the next succeeding advance royalty paying day, lessee shall resume the payment of advance royalty." This provision, however, deals only with the resumption of advance royalty payments when production, which originally resulted in the discontinuance of the payments, ceases. It is without application to a lease such as that here involved which has at no time produced oil or gas in paying quantities.

Question 3 is accordingly answered in the affirmative. However, since the advance royalty payments are required in addition to the rental for a non-utilized gas well, the demand of the Assistant Superintendent on the LeFlore County Gas and Electric Company should be revised to cover the entire amount of the advance royalties during the period included in the demand.

4. The Commissioner of Indian Affairs has also submitted a question concerning the apportionment of advance royalty payments as between assignor and assignee where after the expiration of the fixed term an oil and gas lease executed on lease form (c) was assigned in the middle of a lease year. This question can only present itself where the lease is being maintained by production. Where, as appears to be the case here, such production was sufficient to produce stipulated royalties in excess of the advance royalties, the obligation to make the latter payment terminated under section 5 of the lease. The provision in that section for the resumption of advance royalty payments upon the cessation of production applies in terms only to the fixed period of 10 years. After the fixed term has expired, neither

⁷ The habendum clause (sec. 2) provides, *inter alia*, that the lease shall continue in force as much longer after the 10-year period as the "gas royalties for wells capable of producing gas in paying quantities but not utilized are paid, as provided in paragraph 4 hereof."

section 5 nor any other section of the lease requires the lessee to resume the payment of advance royalty when production ceases or when it declines to the extent that production royalties are less than the advance royalties. The question of apportionment of advance royalties as between the assignor and assignee of such a lease cannot, therefore, arise.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

GEORGE L. RAMSEY, SELECTOR, BY TED E. COLLINS, SUBSTITUTE
ATTORNEY IN FACT

Decided December 26, 1942

Motion for Rehearing decided August 21, 1943

FOREST LIEU SELECTIONS—EXCHANGE OF LANDS UNDER THE ACTS OF JUNE 4, 1897; JUNE 6, 1900; MARCH 3, 1905—SECTION 7 OF THE TAYLOR GRAZING ACT OF JUNE 28, 1934, AS AMENDED BY THE ACT OF JUNE 26, 1936—GENERAL WITHDRAWAL ORDER OF NOVEMBER 26, 1934—CHARACTER OF LAND SUBJECT TO SELECTION.

Lands not of the class and character required by the forest lieu legislation are not proper for disposal under section 7 of the Taylor Act in satisfaction of an outstanding substitute selection right as accorded by the repeal act of March 3, 1905.

The act of June 4, 1897, as amended by the act of June 6, 1900, requires selections of land in lieu of tracts within a public forest reservation to be confined to vacant surveyed nonmineral public lands which are subject to homestead entry.

Forest lands valuable only for their timber and too mountainous for farming or grazing if cleared cannot be classified as suitable for homestead entry and therefore are neither subject to selection under forest lieu legislation nor proper for acquisition in satisfaction of an outstanding exchange right under section 7 of the Taylor Act. Further, such lands are affected by a public interest and may not be restored to the public domain for a disposal incompatible with the purposes of the withdrawal of November 26, 1934.

Lands having a mineral classification made by a board of commissioners under authority of the act of February 26, 1895, approved by the Secretary of the Interior and never revoked are *prima facie* mineral lands and as such are not subject to selection under forest lieu legislation or proper for acquisition in satisfaction of an outstanding substitute exchange right under section 7 of the Taylor Act.

THE RIGHT OF SELECTION ONE OF EXCHANGE—NOT A FLOATING RIGHT—NOT SCRIP—NOT ASSIGNABLE—ITS ASSIGNMENT AS SCRIP BY DEALERS IN PUBLIC

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LAND RIGHTS NOT COUNTENANCED BY THE GOVERNMENT—ASSIGNEES NOT RECOGNIZED—NO PRIVACY.

Forest lieu legislation contemplated an exchange of lands between two owners and in the right of selection created an exchange right, not a floating right subject to barter, sale or assignment. The selection right may be exercised only by the owner of the lands relinquished as base for the selection or for him by his duly authorized agent, and only to such owner may patent to the selected land issue. No selection by an assignee will be considered.

The Department has never countenanced the practice of dealers in public land rights treating the exchange right as scrip and assigning it through the use of double powers of attorney. Although without authority to prevent such private assignments, the Department is not obliged to recognize them and does not do so. If an owner of offered lands contracts privately for a prepatent sale of his interest in selected lands, his transferee has no privity with the Government and will not be recognized by it. If the land department rejects the selection or cancels the right the transferee has no claim on the Government but must look to his vendor through the courts for redress. Nor will the transferor be heard to complain that rejection of his selection or failure of his base has prevented his conveyance of a selection which he has privately sold before acquiring it. *Held:* That where an executor alleges that X, a record owner relinquishing forest reserve lands and making a selection in his own name, acted only in a trust capacity for the benefit of a company dealing in land rights and of the executor's testator, who purchased the selection right involved from the company, and where such executor, whether or not offering proof of his authority to act, applies to withdraw the selection in order to recover the funds invested, the Commissioner of the General Land Office acts correctly in declining to deal with the transferee's estate, in recognizing only the selector of record, in requiring his compliance with the regulations and in canceling the selection upon his default.

RIGHT OF SUBSTITUTE SELECTION UNDER REPEAL ACT OF 1905—CONDITIONS—ERRONEOUS DECISION VACATED—WHEN DEFEATED BY ELIMINATION OF BASE FROM THE RESERVE.

A selector of record who for five years fails to comply with regulations requiring the posting and publication of the selection and whose selection is canceled for such default and closed three months before repeal of the forest lieu acts is not without fault, has no selection pending at repeal and has no right of substitute selection under the proviso of the repeal act.

In such case neither the selector of record nor the alleged heirs of his alleged transferee may at any time be heard to claim a right of substitute selection under the repeal proviso but particularly not when, all parties having failed to make avail of appeal procedures or of other measures designed to protect their rights, they petition for the exercise of supervisory authority in regard to the selection after a lapse of 328 months from its cancellation and without any showing of extraordinary emergency or exigency.

Where forest reserve lands which have been relinquished and stand assigned as unsatisfied base for an outstanding valid right of substitute selection under the repeal act are eliminated from the reserve before the exercise

of such right, the right falls and there can be no enforcement thereof, the reason for the exchange having ceased to exist.

A departmental decision which in circumstances such as those above described holds the cancellation of the selection to have been erroneous, overlooks the interim elimination of the base lands from the forest reserve and accords a right of substitute selection is in error and must be recalled and vacated.

SECRETARY OBLIGED TO OBSERVE STATUTORY DIRECTIVES.

In his administration of the public lands the Secretary of the Interior, although having broad discretionary powers in his supervisory capacity, is bound by the terms of the applicable statutes and by the purposes of the withdrawal. He may not substitute for their conditions rules of his own choosing in particular cases. Nothing in the War Powers Acts authorizes the Secretary to determine the propriety of a substitute selection permitted by the repeal act of 1905 by reference to the war and to the capacity of an applicant's transferee to serve the war's purposes rather than by reference to the conditions imposed by the statutes creating and controlling the selection right. Nor does the Government concern itself with the qualifications of a transferee, with whom it has no privity.

CHARACTER OF LANDS SUBJECT TO SUBSTITUTE SELECTION—ACT OF JUNE 6, 1900.

Both the terms and the legislative history of the act of June 6, 1900, show the congressional intent that in the interest of curbing exploitation of national timberlands all lieu selections made after October 1, 1900, be of lands of the restricted character specified by said act and not of the broader character described by the act of June 4, 1897. This limitation is applicable to a substitute selection made under the proviso of the repealer of March 3, 1905, even though the original selection which it replaces may have been under the 1897 act and of lands more broadly defined.

RIGHT OF SUBSTITUTE SELECTION NO NEW RIGHT—LIMITATIONS.

The proviso of the repeal act of March 3, 1905, creates no new right of exchange but only a right to make a new selection in place of the selection which failed and in exercise of the original right, the quantity of land in the substitute selection to be the same as that in the original selection and no greater, even though additional base, relinquished but never assigned to a specific selection, may remain unsatisfied.

ADMINISTRATIVE DIFFICULTIES—EFFECT OF CHANGES IN FOREST RESERVE BOUNDARIES—NO PROVISION FOR RESTORATION OF INVALID BASE—SCRIP DEALERS—ADDITIONAL SELECTIONS—REVIEW OF MEASURES TAKEN.

Administration of forest lieu selections has been embarrassed by numerous factors basic among which has been the possibility that changes in forest reserve boundaries made before completion of a selection might invalidate the base offered by eliminating it from the reserve and might also thereby cloud the offeror's title, no permanent relief legislation permitting restoration of invalid base to the prior owner having existed before 1930. Measures taken to protect rights included general rules to effect prompt completion of selections, special rules for cases presenting features for equitable

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consideration and stringent directions regarding "additional" selections by scrip dealers who made a practice of offering vast tracts of base land by one relinquishment deed and thereafter making their exchange selections piecemeal, in small quantities, and at their leisure.

Instructions of March 6, 1900 (29 L. D. 579), warned holders of outstanding base that delay in making additional selections would be at their own risk, such selections being subject to all changes in the reserve boundaries and in the forest lieu laws. *Held*: That a valid right of substitute selection under the repeal proviso replacing an "additional" selection found invalid is itself an "additional" selection and subject to all the risks described.

SECRETARY'S AUTHORITY TO ACT SUA SPONTE.

As long as public lands remain under the care and control of the land department its power to inquire into the extent and validity of rights claimed against the Government and to correct its own errors does not cease. When alienation of public land is involved, the Secretary may determine every question presented by the case record without regard for the manner in which the case comes before him for determination.

The departmental decision of August 6, 1931, in George L. Ramsey, Heirs of Edwin C. Philbrick, A. 16060, Lieu Selection No. 1559, recalled and vacated and the right of substitute selection canceled.

CHAPMAN, Assistant Secretary:

This appeal is from a decision made by the Acting Assistant Commissioner of the General Land Office on December 19, 1940, rejecting an application for a forest lieu reselection under the acts of June 4, 1897 (30 Stat. 36), and March 3, 1905 (33 Stat. 1264). The application was filed on May 3, 1939, by Ted E. Collins as substitute attorney in fact for George L. Ramsey (Potlatch Forests, Inc., beneficiary). It sought to exchange 320 acres of base land in T. 28 S., R. 32 E., M. D. M., California, Sec. 21, N $\frac{1}{2}$, reconveyed to the United States by George L. Ramsey by deed dated October 2, 1899, for 320 acres in Idaho in T. 43 N., R. 2 E., B. M., Idaho, Sec. 10, NE $\frac{1}{4}$ NE $\frac{1}{4}$; Sec. 12, SW $\frac{1}{4}$ SW $\frac{1}{4}$; SE $\frac{1}{4}$ SE $\frac{1}{4}$; Sec. 13, NW $\frac{1}{4}$ NE $\frac{1}{4}$; SE $\frac{1}{4}$ NE $\frac{1}{4}$; Sec. 15, SW $\frac{1}{4}$ SE $\frac{1}{4}$; Sec. 25, NE $\frac{1}{4}$ NE $\frac{1}{4}$; Sec. 34, NW $\frac{1}{4}$ NE $\frac{1}{4}$.

With this application Collins filed a copy of a departmental decision of August 6, 1931, and a letter from the Assistant Commissioner of the General Land Office promulgating it under date of August 25, 1931.¹ The decision held that Lieu Selection No. 1559, made by George L. Ramsey on December 18, 1899, had been erroneously canceled on November 21, 1904, and that a right of further selection under the act of March 3, 1905 (33 Stat. 1264), still existed and might

¹ Forest Lieu Selection No. 1559 in National Archives; 1427318, A. 16060, filed in Coeur d'Alene 013863.

be exercised either by Ramsey or by the heirs of E. C. Philbrick, deceased, who was said to have been the real party in interest. Accompanying these documents were a power of attorney to select executed by Ramsey to Jeremiah Collins; a substitute power of attorney from Jeremiah Collins to Ted E. Collins and a statement of the non-mineral character of the lands herein selected and of the fact of their nonoccupancy. This statement purported to be an affidavit but was defective. Additional papers filed were an affidavit as to the absence of springs and water holes and a petition for "Reclassification," praying the Secretary to classify as subject to entry under the provisions of section 7 of the act of June 28, 1934 (48 Stat. 1269), the lands above described. This petition was as follows:

There are a few small creeks fed by springs on the land applied for, but *the same have no value for agricultural or grazing purposes because the land is nonagricultural*, a steep hill side near the top of a divide; and contains a growth of white pine, larch, red fir, white fir and cedar timber; and because of the heavy growth of timber *it never has been used for grazing or agricultural purposes and is not suitable for such purposes; in fact it is chiefly valuable for timber and title to the land is sought for this purpose.* There are no improvements of any kind on said land. The land is not now and never has been occupied by any person. [Italics supplied.]

No part of said land is irrigated or under constructed or proposed irrigation ditches or canals; said land, because of its mountainous character, cannot be irrigated at a reasonable cost or to profitable advantage.

The application accompanying this affidavit is being made for and on behalf of the Potlatch Forests, Inc., of Lewiston, Idaho, who is now the owner of all contiguous lands adjoining that applied for, which are valuable for timber, and title to this land is sought in connection with the regular timber operations of said company.

The essentially timber character of the tracts was confirmed by the Division of Investigations. Its special agent reported that the tracts sought were situate in the watershed of the St. Maries River and were steep, brushy timber lands in old burns or on divides between creeks. The tracts were covered with undergrowth so dense that there was a minimum of grasses and they were unfit for grazing. The tracts all had the same general character. The reproduction was considerable, some small, some heavy. A cruise by Potlatch Forests, Inc., made before October 1939 had estimated that the tracts then contained nearly 2,000,000 feet of timber; consisting of 625,000 feet of white pine and 1,280,000 feet of mixed cedar, fir and larch.

On December 19, 1940, the Assistant Commissioner of the General Land Office held the application for rejection. Besides reviewing the character of the lands, he mentioned a recommendation by the Idaho State Forester to the Idaho Land Board that it make lieu selection of these lands for incorporation of them into the State forest proposed

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for this area. In all the circumstances the Commissioner considered that approval of the application in satisfaction of the forest lieu selection right would not be in the public interest.

On January 27, 1941, appellant filed a timely appeal, making the following specifications of error:

1. That the Commissioner erred in not reclassifying the land applied for under Section 7 of the Act of June 28, 1934 (48 Stat. 1269), as amended by the Act of June 26, 1936 (49 Stat. 1976), and holding that the acquisition of said land by the selector in the interest of the Potlatch Forests, Inc., "would not be in the public interest".

2. It was error not to give due consideration to the fact that the tracts applied for under this application are isolated and disconnected and even though they contain a considerable stand of timber, are of little use and value to any person other than the adjoining land owner.

In addition, he stated that a supporting brief, argument and affidavits would be filed within a short period; but no such papers have been received by the Department.

On December 10, 1941, the Commissioner received a second letter from the Idaho State Forester.² This was dated December 6, 1941, and was to the effect that the State no longer had any interest in selecting the lands here in question, since a certain land exchange bill affecting the matter had failed of passage. Accordingly, the State was not opposed to "the lieu filing made on these lands on May 3, 1939." This letter evidently refers to the application by Collins in the instant case. It does not seem to have induced any change in the Commissioner's decision.

Upon examination of the appeal papers the Department finds the first specification of error too general to be accepted under the Rules of Practice. Further, it does not find in the other specification or in the cessation of the State Forester's interest in these lands or in these points taken together any ground for disturbing the Commissioner's decision that to approve this selection would be contrary to the public interest.

Rights like that here claimed are today controlled by the Taylor Grazing Act³ and the general withdrawal orders of November 26, 1934, and February 5, 1935, which in large part implement the Government's current comprehensive policy of conservation and development of natural resources. The public lands in 24 States have been withdrawn and reserved for classification in aid of these purposes. But section 7 of the Taylor Act as amended authorizes the Secretary

² See Coeur d'Alene 013862.

³ The act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976).

in his discretion to lift the reservation and restore lands to the public domain for disposal in accordance with his determination of the most useful purpose to which they may be put under applicable public land laws. He may open them to entry, selection or location if he can classify them as valuable, suitable or proper for the particular type of disposal suggested.

In this case the Secretary does not find that the lands applied for are proper for acquisition in satisfaction of the outstanding lieu right set forth and therefore he cannot restore them for selection. In the first place the lands cannot be found to be of the class and character required by the acts creating these selection rights.⁴ By the act of June 6, 1900 (31 Stat. 614), selections were to be confined to "vacant surveyed nonmineral public lands which are subject to homestead entry not exceeding in area the tract covered * * *" by the base surrendered. Since these lands have been withdrawn from all forms of entry and reserved as above described they are not "public lands which are subject to homestead entry." Nor can they be made such by being classified as suitable for homestead entry. For they have been found to be essentially forest lands, valuable only for their timber and wanted only because of it. As appellant's own petition concedes, they are wholly unfit for grazing or agriculture. They are so mountainous, rocky, rough and steep that even if cleared of their timber they would be unfit for agriculture and impossible of cultivation. Such lands have not been thought suitable for homestead entry under past administrative practice⁵ nor would a petition for such classification of them be granted under the land laws as contemporaneously understood and administered.⁶

Moreover, these lands are not of the nonmineral character required by the 1900 act, *supra*. The tract books note sections 13, 15 and 25 of T. 43 N., R. 2 E., B. M., as having a mineral classification made in October 1899 and approved March 26, 1901. But in fact all the lands here selected, those in sections 10, 12 and 34 as well as those in sections 13, 15 and 25, are among those unsurveyed Idaho lands which on October 31, 1899, were classified as mineral by the board of commissioners for the Coeur d'Alene land district under authority of the act of February 26, 1895 (28 Stat. 683).⁷ Although certain classifica-

⁴ Whenever by act of the Congress provision is made for disposal of portions of public lands of a designated class and character, selection or entry thereof under such act cannot lawfully be permitted until the lands sought to be acquired are shown to be of the class and character subject to disposal thereunder. *Kern Oil Co. et al. v. Clarke* (On Review, 1902), 31 L. D. 288, 300.

⁵ *Winninghoff v. Ryan*, 40 L. D. 342 (1912), and cases cited. See also question 4 on Form 4-480, "Report of Fraudulent Claim or Entry."

⁶ *United States v. Northern Pacific Ry. Co.*, 311 U. S. 317, 362, 364 (1940).

⁷ Mineral classification No. 3041; also 2565, 2566, 2567 and 2568, in the National Archives.

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tions by commissioners acting under this statute have been protested by the Northern Pacific Railroad Company and others, and even by the Government itself, and in some instances have been revoked by the Department,⁸ the mineral classification just described, which was approved by the Secretary on March 26, 1901, has never been attacked or revoked. Moreover, the Supreme Court has held that the Commissioner's reports and the Secretary's approval and acceptance thereof create a *prima facie* showing in favor of the classification.⁹ Accordingly this particular classification continues in force as to all the selected lands even though it has not been noted on the tract books in connection with sections 10, 12 and 34.¹⁰ Accordingly none of these lands would be subject to selection.

In the second place to permit selection of these tracts believed to be valuable only for their timber, which has a very substantial estimated value, might mean the immediate and complete liquidation of this part of an exhaustible resource in which the whole people have a vital and paramount interest as concerns both conservation and forest values. Against a use of these lands so contrary to the public interest the Government has no guarantee or protection under the statute. The Secretary, having no authority to restore these lands for a disposal potentially in such derogation of the conservation aims of the Taylor Act and of the withdrawal, is under a duty to maintain the reservation.

Appellant asserts that the tracts are isolated and disconnected and as such are of no value to the Government and should be disposed of. Appellant speaks prematurely. Of the eight forties sought one makes part of a considerable area of vacant land; five others would become isolated if certain other lieu selections by appellant were to be allowed but as yet have not been segregated by his applications; and only two are actually isolated.¹¹ However, even if all the tracts were isolated,

⁸ See Mineral Contest No. 2179; also letter of March 3, 1909, Commissioner of General Land Office to Register and Receiver of Coeur d'Alene land office, approved by Secretary, March 3, 1909, Secretary's file No. 2-125, pt. 1, General Land Office Mineral Land Classification, act of February 26, 1895 (28 Stat. 683); *Lamb et al. v. Northern Pacific Railroad Co.*, 29 L. D. 102; *United States v. Northern Pacific Ry. Co.*, 311 U. S. 317.

⁹ *United States v. Northern Pacific Ry. Co.*, 311 U. S. 317, 358 (1940).

¹⁰ Section 1 of the act of February 26, 1895 (28 Stat. 683), ordered classification of all lands within the Northern Pacific Railroad Company's land grant and indemnity land grant limits situate in certain specified land districts. Section 3 provided that if the lands examined were surveyed, classification should be by each legal subdivision; if unsurveyed, by tracts of such extent and within such identifying natural or artificial boundaries as the Commissioners might determine and designate. Section 6 provides in part as follows: "That as to the lands against the classification whereof no protest shall have been filed as hereinbefore provided, the classification, when approved by the Secretary of the Interior, shall be considered final, except in case of fraud, and all plats and records of the local and general land offices shall be made to conform to such classification." [Italics supplied.]

¹¹ Sec. 10, NE $\frac{1}{4}$ NE $\frac{1}{4}$ and Sec. 25, NE $\frac{1}{4}$ NE $\frac{1}{4}$.

appellant's argument could have no weight. The Secretary has no authority to release even an isolated tract for a use which patently might injure the interest of the whole people.

Finding the selection in question improper for satisfaction of the lieu right and contrary to the public interest for the several reasons stated above, the Department affirms the decision of the Acting Assistant Commissioner of the General Land Office. But in addition upon review of all the facts in this case the Department is of opinion that it was in error in its decision of August 6, 1931, in A. 16060, in recognizing a right of reselection in George L. Ramsey in connection with Lieu Selection No. 1559.

The record shows that Ramsey made his original application to select, No. 1559, on December 18, 1899; that for five years, despite repeated notices served on him and on Jeremiah Collins, his attorney in Washington, he failed to comply with the regulations requiring posting and publication of the selection;¹² that on November 21, 1904, for this default the Commissioner rejected the selection and that on November 22, 1904, over three months before repeal of all forest lieu legislation by the act of March 3, 1905, the case was noted on the tract books as canceled and closed.

If this action was erroneous, Ramsey was not without remedy. Although the Commissioner's letter of rejection did not invite appeal, it was regular land office procedure under Rules of Practice,¹³ published and well known, to entertain any appeal filed within 60 days¹⁴ from the date of service of notice of decision. Ramsey however did not appeal.

There was another procedure of which Ramsey might have taken advantage to evidence his belief that the Commissioner had erred. Less than six weeks after expiry of Ramsey's appeal period, the act of March 3, 1905, repealed all the forest lieu legislation. It protected certain interests by a saving clause as follows:

Provided, That selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issue therefor the same as though this Act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof.

But there were persons of whose interests this proviso took no account. These were, first, those who had made proper relinquishment of base lands to the United States but who had failed to make any selection

¹² Instructions of December 18, 1899, 29' L. D. 391, 393.

¹³ Rules of Practice, July 15, 1901, Rules 81, 86, 31 L. D. 527, 539; December 9, 1910, Rules 74, 76, 39 L. D. 395, 407-8; September 1, 1926, Rules 74, 76, 51 L. D. 547, 559-60. See Code of Federal Regulations, Tit. 43, Part 221.

¹⁴ Reduced to 30 days under the 1910 rules.

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before repeal and therefore could make none after it; and, second, those who without fault on their part had seen their selections rejected before repeal and who, having no selections pending at repeal, had therefore no right of further selection after it. Relief of these groups by some sort of legislation was under consideration in the Congress during 1906 and 1907. To ascertain the extent of the need the Senate agreed to the Resolutions of March 19, 1906, and December 18, 1907, directing the Secretary to obtain and report to it the names of the persons, firms and corporations in these groups and the number of acres which each had conveyed or relinquished to the United States.

Thereunder, if Ramsey could properly contend that his selection had been canceled without fault on his part, it was open to him between March 19, 1906, and December 18, 1907, to comply with the Secretary's Instructions¹⁵ under these Resolutions and thus place himself among those to be benefited if the legislation in contemplation should be enacted. Examination of the Secretary's reports¹⁶ to the Senate shows Ramsey among those who had relinquished lands to the Government but had made no selection in lieu thereof before repeal.¹⁷ But his name does not appear on any of the lists of those whose selections had been canceled without their fault but before repeal and who were therefore precluded from further selection.

Since Ramsey neither appealed nor took advantage of the Senate Resolutions to place himself in line for relief in this case and since no word of protest against the decision was heard at any appropriate moment from Ramsey, Collins or anyone else alleging an interest in this selection, it was reasonably to be assumed that Ramsey had recognized his own default in the premises and had acquiesced in the cancelation of his selection.

The assumption was to remain good for 27 years and 4 months. Then on July 22, 1931, after a lapse of 328 months, Jeremiah Collins filed a petition for the exercise of supervisory authority. He represented himself as attorney for the heirs of E. C. Philbrick, alleged transferee of Ramsey, and requested for them a right of reselection. He also filed a letter from Ramsey, who said that with the consent of these heirs he was requesting authority for himself to re-use the base

¹⁵ 35 L. D. 8.

¹⁶ The Secretary made seven reports as follows: Nos. 1-2, November 21 and December 3, 1906, Sen. Doc. No. 18, 59th Cong., 2d sess., Senate Documents, v. 2 (Serial 5069); No. 3, February 20, 1907, Sen. Doc. No. 332, 59th Cong., 2d sess., Senate Documents, v. 5, (Serial 5072); No. 4, February 21, 1907, Sen. Doc. No. 337, *ibid.*; No. 5, February 25, 1907, Sen. Doc. No. 350, *ibid.*; No. 6, February 26, 1907, Sen. Doc. No. 352, *ibid.*; No. 7, December 23, 1907, Sen. Doc. No. 147, 60th Cong., 1st sess., Senate Documents, v. 34, (Serial 5267).

¹⁷ Exhibit A, Sen. Doc. 18, *supra*, footnote 16 shows George L. Ramsey as having relinquished 40 acres.

land and to make another selection under the acts of June 4, 1897, and March 3, 1905.

The essential facts stated were as follows: Ramsey, a bank president in Helena, Montana, had no real interest in this selection and in making it had acted only in a trust capacity for the benefit of the Collins Land Company of Montana. This company had had full control of the basic selection right in Lieu Selection No. 1559 and had sold the right together with all papers necessary for land office filing to E. C. Philbrick of Eastern Montana. Philbrick had located the lands selected but not long subsequently had become mentally ill. On July 24, 1902, he had died, leaving his property by will to his wife and a daughter. The widow also had become insane and in a violent mood had killed first her daughter and then herself. Surviving her daughter, she had succeeded to her daughter's interest in Mr. Philbrick's estate. Upon Mrs. Philbrick's death, her brother and three sisters took the whole. This succession of tragic events, according to Collins, was the probable reason why in the period covered by them this location was "allowed to go by default."

The petition further set forth that "strong and explicit showings" of Philbrick's interest in the selection had been presented to the land office by Sydney Sanner, attorney for the estate, and by Charles Davis, the executor, and that the latter had directed particular attention to the conflict of a considerable portion of the selected land with the grant to the Northern Pacific Railroad Company. Notwithstanding these facts, the petition asserted, the Commissioner had refused to recognize Philbrick and by ignoring the rights and interest of the transferee had caused his loss both of the money which he had invested in the right and of the lands selected. The petition therefore contended that the cancelation was made in error, without proper basis and in contravention of right and justice and it urged that the right of reselection under the act of March 3, 1905, be granted to the Philbrick heirs to redress the wrong that had been done.

The Department entertained the petition and on August 6, 1931, rendered its decision.¹⁸ It was of opinion that the General Land Office should not have ignored the several statements as to Philbrick's interest in the selection; that in view of the conflict with railroad lands alleged by the transferee's executor it should not have required Ramsey, the selector of record, to post and publish the lands; that it should have allowed the transferee's executor to withdraw the selection and in any event should have accorded him the right to appeal

¹⁸ A. 16060, 1427318, filed in Coeur d'Alene 013863.

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to the Department. It therefore held that the selection had been erroneously canceled on November 21, 1904, and recognized a right of reselection as existing under the act of March 3, 1905. This it said might be exercised either by Ramsey or by the heirs of Philbrick in their own names on proper showing of heirship.

The legal argument implied in the petition's statements and apparently adopted by the decision of August 6, 1931, seems to be based upon the hypothesis that the right of selection under the act of 1897 may be transferred by way of assignment and may be exercised vis-a-vis the Government by one other than the owner of the land relinquished; in other words, that this right is a floating right properly subject to barter and sale. The Department considered this question in the early days of this legislation and decided that if the Congress had intended to create a floating right it would have used different language; that the language used clearly negated such intention.¹⁹ The Department has therefore consistently held that under neither the wording nor the spirit of the law is the selection right assignable. It must be exercised by or for the person who relinquishes the land upon which the selection is based. Thus no complications can arise by reason of floating rights acquired by assignment in advance of selection.

According to the long line of decisions, the 1897 act contemplated an exchange between two owners, the United States and the individual holding title to the base lands in a forest reserve, and required that the transaction of exchange should lie between those two only. Nothing in the law could be construed as indicating that it contemplated any different character of transaction. The title to the selected land was in every case to rest in the owner of the relinquished land and patent was to issue only to such owner. In the event of his death after his relinquishment to the United States all subsequent proceedings looking to a completion of the transaction must be carried on in the name of the deceased owner of the base and if the exchange were to be consummated the patent for the lieu lands must issue in his name. Compatibly with this position the Department has also held that the selection right may be exercised *in behalf of* the owner of the base lands by a duly authorized agent or attorney in fact, upon submission of satisfactory proof of his authority. But it has always refused to

¹⁹ In an opinion of August 26, 1898, sent to a member of the Congress, Secretary Bliss stated " * * * the act of June 4, 1897, does not provide for the issuance of scrip in any form." See 28 L. D. 472.

recognize an assignee.²⁰ In this it has but followed a principle well established in earlier land law that—

The Department must deal directly with its own vendees, with the persons with whom it contracts. It cannot undertake to follow the transfers of the grantees, and to settle questions that may arise upon such transfers, but must leave such matter for determination in the courts.²¹

This interpretation of the Government's relation to those exercising the selection right does not imply that an owner contemplating an exchange with the Government may not privately contract in advance of patent to sell his interest in the selected lands. It does mean however that his transferee has no privity with the Government and can make no demands upon it. Further, just as one who purchases an equitable title while legal title remains in the Government takes and holds it subject to all equities upon it in the hands of his vendor, the prepatent purchaser of a right in selected lands has no better right or standing than his vendor, the selector. He is charged with knowledge of the law and he buys subject to the risk that the land department may for cause cancel the selection. In such event he has no resort to the Government but must look to the courts for such redress from his vendor as the terms of his contract may afford.²²

From this review it is clear that however complete and convincing might have been the evidence²³ alleged to have been presented to the land office that Ramsey, or Collins, had sold his interest in the selection to Philbrick, the Commissioner was under a duty to deal only with Ramsey, owner of the base lands and selector of record, and not with the alleged transferee. It is clear, further, that both Jeremiah Collins, attorney of record for Ramsey, and the Philbrick estate were charged with knowledge of the legal principles above set forth. Besides, for about a year and a half before the selection was canceled, the estate had been in correspondence with the Commissioner and not only was in possession of complete official information concerning the selection but was upon express notice that Philbrick was not the

²⁰ *F. A. Hyde* (On Review), 28 L. D. 284, 286 (1899); *John K. McCornack*, 32 L. D. 578 (1904); *Albert L. Bishop*, 33 L. D. 139 (1904); *Heirs of George Liebes*, 33 L. D. 458 and 460 (March 10, 1905); *F. A. Hyde and Co.*, 33 L. D. 639 (June 21, 1905); *Hiram M. Hamilton*, 39 L. D. 607 (1911); *Martin v. Patrick*, 41 L. D. 284 (1912); *Hammond Lumber Co.*, 46 L. D. 479 (1918); *Hiram M. Hamilton, Inland Lumber and Timber Company, Transferee*, On Rehearing, 50 L. D. 504 (May 26, 1924); Paragraph 19, Instructions of July 7, 1902 (31 L. D. 372).

²¹ *R. M. Chrisinger*, 4 L. D. 347, 350 (1886); *C. P. Cogswell*, 3 L. D. 23, 29 (1884); *Margaret S. Kissack*, 1 C. L. L. 421 (1880).

²² *Smith v. Custer et al.*, 8 L. D. 269, 278 (1889); *Boone v. Chiles*, 10 Peters 177; *Root v. Shields*, 1 Woolworth 340.

²³ In point of fact what the petition referred to as "evidence" and "strong, explicit showings" that Philbrick was the real party in interest was only unsupported assertions and conclusions. The land office never received any legal evidence on this point. See the letters and papers in Lieu Selection No. 1559, National Archives.

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selector of record and that his estate could not be recognized by the land office.

In view of the statements about the explicit information given to the land office, the facts bear some review. In June 1903 the attorney for Philbrick's estate, Mr. Sydney Sanner of Miles City, had inquired the status of a selection which his testator was said to have made and which was believed to be No. 1559 but about which no data had been found in his papers. The Commissioner promptly advised Sanner that Selection 1559 had been made by Ramsey; that there was no power of attorney from Ramsey to Philbrick or anything to show that Philbrick was a party in interest; and that the sole appearance of Philbrick's name in connection with the matter was on a nonmineral affidavit which Philbrick had executed on December 18, 1899.²⁴ He also gave Sanner complete details about the application, the lands selected and the defaults of the selector to date, namely, his failure to describe certain unsurveyed lands in terms of future surveys and to give notice of the selection by posting and publishing.

The estate attorney did not answer this letter nor did Jeremiah Collins make any explanation on behalf of any party, although he was apprised of this as of every other proceeding in the case. A year later, however, on July 16, 1904, Mr. Charles Davis of Miles City, representing himself as executor of the estate, applied to withdraw the selection in order that he might try to recover for the estate the funds invested therein. He made no reference to Sanner's inquiry or to the Commissioner's answer but by affidavit filed with the register set forth his lack of success in locating and posting the selection. Some of the tracts he said he had found to be within the grant limits of the Northern Pacific Railroad Company. Others he could not find at all. He also stated that upon presenting these facts to the court²⁵ having jurisdiction of the estate he had been directed by the court—

* * * to dispose of the estate's said interest in said matter *by withdrawing said application, or otherwise, and taking such steps as may be appropriate in the premises and securing for said estate the funds invested therein by said deceased.* * * * [Italics supplied.]

Davis provided no proof of his authority as executor. Nor did he submit any identification or description of the tracts in conflict with the railroad grant or of those which he could not find. He referred to "annexed schedules" and to "the record of the proceedings in the matter of said estate *hereto attached.*" [Italics supplied.]

²⁴ Actually the file (L. S. 1559) contained two nonmineral affidavits, the second executed on February 20, 1903, by George Scheetz of Miles City.

²⁵ The District Court of the Seventh Judicial District of the State of Montana in and for the County of Rosebud.

But no such papers were attached to the affidavit. Nor were they received at any subsequent date. The register's letter transmitting the affidavit suggested that proof of the executor's authority to act might follow but it never did.

The Davis application to withdraw the selection, received through the register on July 16, 1904, was answered through the register on July 28, 1904, by a letter reviewing the whole matter. The Commissioner again advised that there was no evidence in the papers to establish that Philbrick then had or ever had had any interest in the selection save as affiant of a nonmineral affidavit and that in all the circumstances the office could recognize only Ramsey as concerned with the requirements of the case. He therefore insisted upon Ramsey's compliance with the regulations for posting and publication within 60 days upon pain of cancelation of the selection without further notice. On November 21, 1904, he canceled the selection for Ramsey's default. On November 22 the case was closed on the tract books.

This whole action of the Commissioner was strictly in accord with the Department's construction of the statutes as above outlined. In the first place, since the Government had no privity with Philbrick and no duty toward him, it is difficult to see what error the Commissioner committed in declining to deal with the transferee's estate in the stead of the selector of record either as to the selection generally or as to any particular phase of it such as the alleged conflict of some tracts with the railroad grant. The Government's business was with its offeree, not his transferee, and the Government was under no compulsion to deal with the latter as to anything. In the second place, it was proper for the Commissioner to require publication and posting under the Instructions of July 7, 1902, 31 L. D. 372. Notice of the requirement was duly received and receipted for by Ramsey himself at his record post-office address. It was Ramsey's duty to comply with the regulations but he failed to do so. The cancelation of a selection in such circumstances has been held to be regular and proper and to be the fault of the selector.²⁶

Thereafter nothing further was heard from the Philbrick estate, although it was the executor's privilege to appeal from the Commissioner's decision, had he so desired.²⁷ The Collins petition spoke of the Philbricks as having allowed this selection to go by default and sought to excuse it. Referring to the successive deaths of Philbrick, his daughter and his wife, its exact language was the following:

²⁶ *Santa Fe Pacific R. R. Co. et al.*, 40 L. D. 360 (1911).

²⁷ Rules 74 and 78, Rules of Practice, 51 L. D. 547, 559, 560; 43 CFR 221.73 and 221.77.

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In the period covered by these sad events, it is no wonder important business of the Philbricks received no consideration and in particular that this scrip location was allowed to go by default.

Although the point is of no ultimate consequence one way or the other, it should be observed that the facts do not support this conclusion. Philbrick died on July 24, 1902. Within a year, as has been seen, Sydney Sanner, the lawyer for Philbrick's estate, and Charles Davis, its executor, concerned themselves with this matter and obtained information about it. From July 1903 to July 1904 the executor, believing it to be the estate's duty to perfect the selection, tried to meet the requirements but had to report failure to the court and to the Commissioner. On July 28, 1904, the Commissioner correctly made clear to Davis that the obligations in the case were Ramsey's and that only Ramsey would be recognized. Thereafter, Davis did not pursue the matter further with the land office. He did not protest the Commissioner's explanations. Nor did he take an appeal after cancelation on November 21, 1904.

This course of action, followed in the period from July 1903 to January 1905 by the executor of the E. C. Philbrick estate, can scarcely be characterized as neglect or default. Nor can it be attributed to preoccupation with the tragic deaths of Philbrick's daughter and wife, as suggested by the Collins petition, for those deaths did not occur until July 17, 1910, nearly six years after cancelation. Instead, the course pursued was logical in the circumstances. For upon receipt of the Commissioner's firm letter of July 28, 1904, Davis could scarcely continue to regard compliance with the regulations as the estate's responsibility. In addition it must be remembered that since the estate's attempt to withdraw the selection had failed, Davis was under the court's alternative order²⁸ to proceed "otherwise" to secure the funds which the testator had invested in the selection. The record does not indicate whether he proceeded against Ramsey and the Collins Land Company either in or out of the local courts. But it seems unreasonable to assume that Davis would not make some effort to obey the court and take the other steps appropriate in the premises, if he was in a legal position to do so.

In this connection it should be noted that in applying for the right of reselection for the Philbrick heirs neither they nor their attorney, Collins, made any showing that none of the successive Philbrick interests had been recompensed in any way from any source whatever for the loss of the original investment alleged to have been made in

²⁸ *Supra*, footnote 25.

this canceled selection. Nor did Collins show that the Collins Land Company had not retained the purchase price of the selected land paid to it by the decedent.

Indeed the statements presented by Collins and Ramsey were wholly unsupported by affidavits or documentary evidence of any sort. Although both asserted that in making this petition they acted under the authority and with the consent of the Philbrick heirs, neither of them filed any evidence of such authority or consent or made any showing that such heirs would benefit by the right of reselection should it be granted to them. Again, although Collins designated as the Philbrick heirs three sisters and a brother of Mrs. Helen Howard Philbrick, widow of E. C. Philbrick, namely, Grace Harris, Reno, Nevada, Bessie Hout, Etna, Montana, Annie H. Van Horn, Miles City, Montana, H. M. Howard, Miles City, Montana, he filed no evidence to show that these persons were such heirs or that they were or had been the only Philbrick heirs or that they were alive at the date of the petition. There was neither certified copy nor abstract of E. C. Philbrick's will; of the decree of distribution of his estate; or of the proceedings regarding the estate of either Philbrick's daughter or his wife, Helen Howard Philbrick, or regarding the distribution thereof.

The petition was further defective in failing to show what emergency, newly arising after 27 years of acquiescence by all parties in the decision of November 21, 1922, suddenly demanded the exercise of supervisory power. Yet "positive showing of extraordinary emergency or exigency" is a basic requirement for the consideration of such a petition under the rule.²⁹ Nor in seeking the right of further selection did the petition apply to select a particular tract of land as required by the Department's rule.³⁰

On the whole it would seem that there was little or no ground for entertaining this petition or for exercising supervisory authority concerning it. If the several well-established rules of construction and practice above described were to be followed, neither Philbrick nor his estate could be considered as having had any claim upon the Government at any time, whether in 1904 or in 1931. Nor could a right of reselection be thought to exist in Ramsey, since his case was properly closed before repeal on March 3, 1905, and his selection was not pending on that date. Further, since Ramsey's selection was canceled for his fault in failing to comply with the publication requirement, he would be barred under the proviso of the repeal act from using his relinquished land as base for a further selection.³¹

²⁹ Rule 85, Rules of Practice of September 1, 1926, as amended, 51 L. D. 547, 561.

³⁰ *John A. Eddy (On Rehearing, 1919)*, 47 L. D. 109, 111.

³¹ *Santa Fe Pacific R. R. Co. et al.*, 40 L. D. 360, 361, 362 (1911).

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Finally, even if all these principles were to be ignored, the right of reselection could not be held to exist, for the statutory reason for an exchange of lands between Ramsey and the United States had ceased to exist. The forest lieu legislation of June 4, 1897, for exchange of lands inside forest reserves for lands outside had reciprocal purposes, namely, to give the Government exclusive control over all lands within forest reserves and to relieve persons whose lands became imprisoned in them. By 1931 these purposes had here been accomplished in a manner other than that of exchange. The lands to be offered by Ramsey as base for a new selection were situate within the Sierra Forest Reserve on October 6, 1899, when his deed³² of October 2, 1899, reconveying them to the United States was duly recorded in Kern County, California. They were later transferred to the Kern National Forest and then to the Sequoia National Forest. But they were eliminated from the Sequoia by proclamation of December 5, 1917 (40 Stat. 1726).

At that time Ramsey's selection had been canceled for 13 years. Throughout that period and for 14 years longer he did nothing to protect or assert the right which the 1931 petition endeavored to claim. In 1917, midway in this laches of 27 years, there occurred a fundamental change in the character of the offered lands. Their loss of the sole attribute qualifying them for exchange thereupon made it inequitable to permit even a sound claim to be enforced.³³ Against such a contingency the Department had early warned³⁴ and its Instructions of March 6, 1900,³⁵ specifically stated:

Additional selections of lands in satisfaction of relinquishments previously made will be subject to all changes occurring in the meantime both in the reservation boundaries and in the law governing the right to make selection of lieu lands.

Because of all the foregoing considerations it is held that no right of reselection exists either in George L. Ramsey or in the heirs of E.

³² The base was T. 28 S., R. 32 E., M. D. M., California, Sec. 21, N $\frac{1}{2}$.

This 320-acre tract had been among lands granted by the United States to the Southern Pacific Railroad Company by letters patent of May 25, 1896, and were part of 20,000 acres deeded to George L. Ramsey by the company on July 10, 1899, for \$65,000. When this base was reconveyed to the United States by Ramsey on October 2, 1899, it was transferred not by itself but as part of 4,720 acres conveyed to the United States by Ramsey's single deed of that date, all as base for lieu selections to be made from time to time in the future.

The abstract of title for 320 acres of base in Selection No. 1559 was made part of the general abstract provided for the ensemble of 4,720 acres conveyed. That general abstract was first filed with Selection No. 681 and is now to be found in the same file as the collective deed, namely, Helena.0273. See therein letter of Jeremiah Collins, Attorney for Ramsey, November 22, 1902, explanatory of the form and transmittal of abstract.

³³ *Honey Lake Valley Co. et al.*, 48 L. D. 192, 195 (1921); *Galliter v. Cadwell*, 145 U. S. 368, 373.

³⁴ *William S. Tevis*, 29 L. D. 575, 577 (February 28, 1900).

³⁵ 29 L. D. 578-9.

C. Philbrick on the basis of the land conveyed to the United States in Lieu Selection No. 1559. The departmental decision of August 6, 1931, A. 16060, in that selection is hereby recalled and vacated. The Commissioner of the General Land Office will send a copy of this decision to each of the persons mentioned in the Collins petition as the heirs of E. C. Philbrick and will take the requisite steps to return to the party entitled thereto the title to the base land in Selection No. 1559 in the manner authorized by the act of April 28, 1930 (ch. 219, sec. 6, 46 Stat. 257, 43 U. S. C. sec. 872).

As before stated, the decision of the Acting Assistant Commissioner of the General Land Office rejecting the application to select in Coeur d'Alene 013863 is affirmed.

Affirmed.

MOTION FOR REHEARING

On December 26, 1942, the Department affirmed the General Land Office decision which had rejected the application in Coeur d'Alene 013863 by Ted E. Collins of the Collins Land Company in Helena, Montana, to make forest lieu selection of certain Idaho lands. In addition, the Department recalled and vacated the departmental decision of August 6, 1931, in A. 16060, which had accorded the reselection privilege here sought to be exercised, and it held that in the premises no right of reselection existed. Collins through his Washington attorney duly moved for rehearing. Later, after extensions of time, he filed through his Montana attorney an informal paper intended as brief and argument in support of the motion.

These papers together present no controlling question that was not fully considered when the decision complained of was prepared and they make no affirmative showing that its conclusions were clearly wrong. Hence the motion might well be dismissed without further consideration.¹ However, considering the complexity of the subject matter and the very considerable confusion obviously existing as to how this nearly forgotten exchange right is affected by the amendatory and repeal forest lieu legislation and by the Taylor Grazing Act, the Department deems it useful to review here in relation to the facts of this case the well-settled departmental interpretation of these laws.

The complicated facts in this case were presented and discussed in detail in the decision of December 26, 1942. But for convenience of reference they are outlined here as follows: On May 3, 1939, Ted E. Collins of the Collins Land Company of Helena, Montana, as substitute attorney-in-fact for George L. Ramsey, filed application, Coeur d'Alene 013863, for a forest lieu selection under the acts of June 4, 1897 (30 Stat. 36), and March 3, 1905 (33 Stat. 1264). With it was

¹ *Cobb v. Crowther*, 46 L. D. 473.

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his petition for classification of the land under section 7 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1272), as amended by the act of June 26, 1936 (49 Stat. 1976, 43 U. S. C. sec. 315f), stating that the lands were valuable only for their timber and were wanted for that purpose for the benefit of a lumber company, Potlatch Forests, Inc. They were not included within a grazing district and were described as follows: T. 43 N., R. 2 E., B. M., Idaho, Sec. 10, NE $\frac{1}{4}$ NE $\frac{1}{4}$; Sec. 12, SW $\frac{1}{4}$ SW $\frac{1}{4}$; SE $\frac{1}{4}$ SE $\frac{1}{4}$; Sec. 13, NW $\frac{1}{4}$ NE $\frac{1}{4}$; SE $\frac{1}{4}$ NE $\frac{1}{4}$; Sec. 15, SW $\frac{1}{4}$ SE $\frac{1}{4}$; Sec. 25, NE $\frac{1}{4}$ NE $\frac{1}{4}$; Sec. 34, NW $\frac{1}{4}$ NE $\frac{1}{4}$.

The base offered for this selection consisted of 320 acres in T. 28 S., R. 32 E., M. D. M., California, Sec. 21, N $\frac{1}{2}$, and had been among lands granted by the United States to the Southern Pacific Railroad Company in 1896 and by the company sold in a tract of 20,000 acres to George L. Ramsey on July 10, 1899. On October 2, 1899, this base was situate in the Sierra Forest Reserve and on that date was re-conveyed to the United States by Ramsey as part of 4,720 acres which were deeded by a single instrument and which were to be offered as base for forest lieu selections of varying quantities to be made from time to time subsequently.² At the request of the Kern County Abstract Company, this deed was recorded in Kern County, California, on March 17, 1903. After various transfers from one reserve to another, the base lands were finally eliminated from the Sequoia National Forest by proclamation of December 5, 1917 (40 Stat. 1726).³

On December 18, 1899, Ramsey designated the half section described above as base for Lieu Selection No. 1559.⁴ During five years thereafter, despite repeated notices served on him and on Jeremiah Collins, president of the Collins Land Company, who was Ramsey's attorney in Washington, Ramsey failed to comply with the regulations requiring posting and publication of the selection.⁵ During this period the estate of E. C. Philbrick, without proof of authority, sought recognition as the real party in interest in the selection and alleged that part of the selection was in conflict with the grant to the Northern Pacific Railway Company. The Commissioner of the General Land Office explained that he had authority to deal only with Ramsey. Subsequently, on November 21, 1904, he rejected the selection for Ramsey's default in failing to post and publish the selection. Ramsey did not appeal. On March 3, 1905, when all forest lieu legislation

² This practice was subsequently criticized by the Department and terminated as erroneous and unauthorized. *William S. Tevis*, 29 L. D. 575; *Instructions of March 6, 1900*, 29 L. D. 578.

³ Decision of December 26, 1942, *supra*, p. 289.

⁴ Forest Lieu Selection No. 1559, in National Archives.

⁵ *Instructions of December 18, 1899*, 29 L. D. 391, 393.

was repealed by the act of that date (33 Stat. 1264), the selection had for several weeks been noted on the tract books as canceled and closed and was no longer pending.

Twenty-seven years later, on July 22, 1931, Ramsey's attorney, Jeremiah Collins, filed a petition for the exercise of supervisory authority,⁶ requesting the right of reselection under the proviso of the repeal act of 1905 for the benefit of the heirs of E. C. Philbrick. Collins alleged that Philbrick had been transferee of Ramsey's selection interest. He represented himself as acting for the alleged heirs; but he submitted no proof of their heirship, of his authority to act for them or of any emergency which after so many years could require this proceeding. The Department nevertheless entertained the petition and by decision of August 6, 1931,⁷ held that the cancellation of the original selection had been erroneous and permitted a reselection to be made under the repeal proviso.

Eight years later, on May 3, 1939, Ted E. Collins, son of Jeremiah Collins, sought as substitute attorney-in-fact for Ramsey to exercise the privilege for the benefit not of the Philbrick heirs but of Potlatch Forests, Inc., filing the instant application, Coeur d'Alene 013863, and a copy of the decision of August 6, 1931. In pursuance of that decision the General Land Office entertained the application but concluded that to classify the desired lands as proper for selection, under section 7 of the Taylor Grazing Act, would not be in the public interest, it being reported that these lands were timber lands, unfit for grazing or agriculture, and that they might possibly be selected by the State of Idaho for inclusion within a State forest. The Acting Assistant Commissioner therefore rejected the application by decision of December 19, 1940.

Upon Collins' appeal, the Department reviewed the entire basic record.⁸ In consequence of its inquiry, the Department by a detailed decision of December 26, 1942, affirmed the Commissioner's rejection of the instant application, recalled and vacated the departmental decision of August 6, 1931, in A. 16060, and held that no right of reselection existed.

Briefly stated, the principal grounds for this decision were as follows: First, on the assumption that appellant had a valid right of reselection, the Department held that the lands selected were not "proper for acquisition in satisfaction of a lieu or exchange right," as required by section 7 of the Taylor Grazing Act, because in character they did not meet requirements of the forest lieu laws⁹ that

⁶ 1427318.

⁷ A. 16060.

⁸ Forest Lieu Selection No. 1559; 1427318; A. 16060; and Helena 0273.

⁹ The act of June 4, 1897 (30 Stat. 36), as amended by the act of June 6, 1900 (31 Stat. 614).

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selected lands be "vacant surveyed nonmineral public lands which are subject to homestead entry." As lands *valuable only for their timber* they could not properly be classified as subject to homestead entry. As withdrawn forest lands affected by a public interest they could not be restored to the status of public lands since disposal of them might mean immediate liquidation of an exhaustible resource in derogation of the conservation aims of the Taylor Grazing Act and of the withdrawal order. Finally, having received from commissioners appointed under the act of February 26, 1895 (28 Stat. 683), a mineral classification which had been approved by the Secretary and never revoked, these lands while perhaps in fact nonmineral as required were nevertheless *prima facie* mineral lands.

Second, the Department held that appellant had no valid right of reselection. It considered that the decision of August 6, 1931, holding the Commissioner of the General Land Office in error in refusing to recognize the Philbrick estate and in canceling Ramsey's selection for his noncompliance with the regulations, had overlooked the well-settled interpretation of the forest lieu selection laws as creating an exchange right, *not scrip*, and also the long-standing rule against recognition of an assignment or of an assignee of a selector. It held that the Commissioner had acted correctly in 1904 and that since he had regularly and lawfully canceled the selection for the selector's fault and before repeal there was no selection pending on March 3, 1905, and no authority in the Department to grant the privilege of reselection under the repeal proviso.

Third, the Department held that even had a valid right of reselection existed in Ramsey on March 3, 1905, none existed in him on May 3, 1939, when this application was filed, or even on August 6, 1931, when the departmental decision assumed to accord it. For on December 5, 1917, appellant's laches aside, the base land had been eliminated from the forest reserve within which it had been included and the statutory reason for an exchange had thereupon ceased to exist, a risk implicit in any delay in the making of a selection after the filing of a relinquishment. Accordingly, the Department vacated the 1931 decision and held that no right of reselection existed.

The several specifications of error assigned in appellant's motion will appear in the course of this decision and need not be set forth here. It is to be noted now however that most of these received no attention in the discursive paper later filed nominally as brief and argument in their support. Despite its title that paper is not cast as a brief and does not address itself to the grounds of the motion but informally advances its own interpretation of the statutes in question and of the decision's errors in regard thereto. The paper

cites no authorities for its positions. It takes no account whatever of the departmental instructions and regulations implementing the statutes, of the many reported decisions interpreting them or of the facts, the law or the citations presented in the decision complained of. As to the basic facts, several striking misstatements suggest that the paper must have been prepared without reference to any file or record. In the circumstances the Department will limit its discussion here to the basic misconceptions of the two papers together and to the statutory controls presently existing in the premises.

The forest lieu selection statutes here involved are the act of June 4, 1897 (30 Stat. 36); the amendatory act of June 6, 1900 (31 Stat. 614); and the repeal act of March 3, 1905 (33 Stat. 1264). The relevant part of the 1897 act is as follows:

That in cases in which a tract covered by an unperfected bona fide claim or by a patent is included within the limits of a public forest reservation, *the settler or owner* thereof may, if he desires to do so, relinquish the tract to *the Government*, and may select in lieu thereof a tract of *vacant land open to settlement not exceeding in area the tract covered by his claim or patent*; * * * [Italics supplied.]

As to this statute, a fundamental point to be noted is that according to a long line of decisions the act contemplated *an exchange between two owners* and that nothing in it can be construed as indicating that it envisaged any other or different character of transaction. From the beginning however dealers and speculators in public land rights have persisted in treating the exchange right as scrip, a floating, assignable right, and have made persistent efforts to persuade the Department to this view. But the Department early decided that no floating right was intended by the Congress; that this law does not provide for the issuance of scrip in any form or for the certification of a right of selection; and that to speak of a "scrip right" or "scrip land" under this legislation is inaccurate and tends to confuse and mislead.

Under the act the Department had no power to *prevent* assignment and scrip treatment of the exchange right by its owner such as it later received in connection with the right of selection and second entry granted to settlers and entrymen on Baca Float Numbered Three, in the State of Arizona.¹⁰ It could not require applicants to

¹⁰ In the act of July 5, 1921 (42 Stat. 107), for the relief of settlers and entrymen on Baca Float Numbered Three, in the State of Arizona, the Congress ensured that the right thereby granted should not be treated as scrip by providing in section 3: "That the right of selection and second entry hereby granted shall not be assignable, directly or

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submit proof that they had not sold or assigned or contracted to sell or assign, directly or through irrevocable power of attorney, either their right to select or the selected lands themselves. But it could and did *refuse to recognize assignments and assignees*.

The Department has therefore repeatedly held that although the selection right may be exercised in behalf of the owner of the base lands by a duly authorized agent or attorney-in-fact upon proof of his authority the right *insofar as the Government is concerned* is not assignable; that an application to select made by an assignee will not be considered; and that patent will not issue to an assignee but only to the owner of the base lands. Its position has been that if an owner who contemplates an exchange with the Government chooses to contract privately for the sale of his interest in selected lands in advance of their being patented to him, his transferee has no privity with the Government, will not be recognized by it and can make no demands upon it; and that no questions arising between the owner and his transferee upon such sale are any concern of the Government's.

Obviously, therefore, those who choose privately to treat the exchange right as scrip do so at their own risk. The prepatent purchaser of an interest in selected lands is charged with knowledge of the law and buys subject to the contingency that the land department may reject the selection or for cause even cancel the right. In such event the transferee has no resort to the Government but must look to the courts for such redress from his vendor as the terms of his contract may afford. Nor is the case different with respect to the transferor. He cannot complain to the Government if rejection of his selection or failure of his base prevents his conveyance of a selection privately sold before he acquires it.¹¹

through irrevocable power of attorney, and must be exercised within three years after the passage of this Act * * *: *Provided*, That * * * the applicant shall submit proof that he has not sold, assigned, nor relinquished his homestead * * * and that he has not sold or contracted to sell, directly or indirectly, said selected land: *And provided further*, That the entire right of reselection under each entry shall be exercised at the same time, * * *."

¹¹ *Secretary Bliss to Representative De Vries*, August 26, 1893, 28 L. D. 472.

F. A. Hyde (On Review), 28 L. D. 284, 286 (1899); *John K. McCornack*, 32 L. D. 573 (1904); *Albert L. Bishop*, 33 L. D. 139 (1904); *Heirs of George Liebes*, 33 L. D. 458 and 460 (March 10, 1905); *F. A. Hyde and Co.*, 33 L. D. 639 (June 21, 1905); *Hiram M. Hamilton*, 39 L. D. 607 (1911); *Martin v. Patrick*, 41 L. D. 284 (1912); *Hammond Lumber Co.*, 46 L. D. 479 (1918); *Hiram M. Hamilton, Inland Lumber and Timber Company, Transferee*, On Rehearing, 50 L. D. 504 (May 26, 1924); Paragraph 19, *Instructions of July 7, 1902*, 31 L. D. 372.

R. M. Chrisinger, 4 L. D. 347, 350 (1886); *C. P. Cogswell*, 3 L. D. 23, 29 (1884); *Margaret S. Kissack*, 1 C. L. L. 421 (1880).

Smith v. Custer, et al., 8 L. D. 269, 278 (1889); *Boone v. Chiles*, 10 Peters 177; *Root v. Shields*, 1 Woolworth 340.

George L. Ramsey, decision of December 26, 1942, *supra*, pp. 283, 284.

Despite these well-settled rulings and the financial risks involved in the flouting of them, the public land speculators have never abandoned their practice of treating this right as scrip and assigning it.¹²

In the instant case appellant, who says that for years he has been a dealer in scrip, pleads that he has sold the resale privilege here in question to Potlatch Forests, Inc., as "approved scrip"; that the lumber company is the real party in interest; *that its rights are the basis for this proceeding*; and that appellant will be left in an awkward situation unless the selection here made be allowed. His plea has no merit. The principles and rules above described are still in force and are here applicable. In consequence appellant cannot be heard to complain that by rejection of this selection and cancellation of the resale privilege the Government stultifies itself and embarrasses appellant, preventing his performance of his contract with a third party which has parted with value in reliance upon his guarantee of the right as approved scrip. Moreover, as regards Potlatch Forests, Inc., the State courts are open to that corporation if under its contract it have a legal grievance against the Collins Land Company. But, as above made clear, the lumber company as an assignee has no privity with the Government and can have no resort to it. Nor has the Secretary any authority to take cognizance of the "awkward" plight of either party.

As one of his assignments of error appellant charges that the Department has disregarded section 7 of the Taylor Grazing Act, which authorizes the Secretary to classify and open to selection—

lands * * * more valuable or suitable for the production of agricultural crops * * * or proper for acquisition in satisfaction of any outstanding lieu, exchange or scrip rights or land grant.

The exact opposite is the case. On page 277 of the decision of December 26, 1942, the Department stated:

Rights like that here claimed are today controlled by the Taylor Grazing Act and the general withdrawal orders of November 26, 1934, and February 5, 1935, which in large part implement the Government's current comprehensive policy of conservation and development of natural resources. The public lands

¹² The assignment is accomplished privately by the use of double powers of attorney granted by the owner of the base lands for a valuable consideration to undesignated persons and placed in the hands of scrip dealers together with certain other papers. The first is a naked, revocable power to select and to appoint substitutes to execute the power. The second is an irrevocable power to convey the selected lands, coupled with an interest. Only the power to select concerns the Department, is filed with it and is necessary to its adjudications. The power to convey is an entirely private matter, concerning only the donor and his donee. Whatever its terms, it is entirely foreign to the Government record and is nothing of which the Government takes or need take any cognizance.

For a description of these powers and of the way in which a scrip dealer uses them see *United States v. Payette Lumber & Mfg. Co.*, and *Conklin v. Cobban*, 198 Fed. 881, 886-887 (1912); and *Cobban v. Conklin*, 208 Fed. 231, 232, 233 (1913).

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in 24 States have been withdrawn and reserved for classification in aid of these purposes. But section 7 of the Taylor Act as amended authorizes the Secretary in his discretion to lift the reservation and restore lands to the public domain for disposal in accordance with his determination of the most useful purpose to which they may be put under applicable public land laws. He may open them to entry, selection or location *if he can classify them as valuable, suitable or proper for the particular type of disposal suggested.* [Italics supplied.]

To determine whether the disposal here applied for is "proper" the Secretary obviously must ascertain whether the lands meet the requirements of the acts creating the forest lieu selection right. For wherever by act of the Congress provision is made for the disposal by selection, entry and patent of portions of the public lands of a designated class and character, as was done by the act of June 4, 1897, and the act of June 6, 1900, it is the duty of the land department to ascertain and determine whether lands sought to be acquired under the act are of the class and character thereby made subject to disposal.¹³ In addition, in view of the conservation aims of the Taylor Grazing Act and the withdrawals made in aid of it, the Secretary must also inquire whether the disposal sought would be compatible with the purposes for which the land was reserved. If either of these elements is lacking the Secretary cannot find it "proper" to open the land for such disposal.

Such inquiry having been made in this case, the Secretary found that the lands sought were not proper for acquisition in satisfaction of this lieu right and could not be restored. The decision explained in detail that the lands were not of the class and character required by the act creating the selection right. As to the other element the decision said:

In the second place to permit selection of these tracts believed to be valuable only for their timber, which has a very substantial estimated value, might mean the immediate and complete liquidation of this part of an exhaustible resource in which the whole people have a vital and paramount interest as concerns both conservation and forest values. Against a use of these lands so contrary to the public interest *the Government has no guarantee or protection under the statute.* The Secretary, having no authority to restore these lands for a disposal *potentially in such derogation of the conservation aims of the Taylor Act and of the withdrawal,* is under a duty to maintain the reservation. [Italics supplied.]

It is clear therefore that instead of disregarding section 7 the decision gave full effect to its relevant provisions and to the withdrawals made in aid of it.

¹³ *Instructions of March 6, 1900*, 29 L. D. 578, 580, par. 3; *Instructions of March 19, 1901*, 30 L. D. 538; *Kern Oil Co. et al. v. Clarke* (On Review, 1902), 31 L. D. 288, 300. See also the decision of August 21, 1943, in *Allison and Johnson*, *supra*, pp. 236-239.

As to the necessity of safeguarding the exhaustible resource on these lands, appellant states that disposal of these lands to Potlatch Forests, Inc., would not mean immediate liquidation of their timber, since this company logs the forests under its control on the basis of sustained yield.¹⁴ He also urges approval of this application for the benefit of the company on the ground that it would help the company in its important contribution of lumber to the war effort and therefore be in the public interest.

This argument gives no weight to the fact that in his administration of the public lands the Secretary, although having wide power to do justice in his supervisory capacity, is nevertheless bound by the terms of the applicable statutes and may not substitute for their conditions rules of his own choosing in the circumstances of a particular case. Here the conditions to be met by him in determining whether the selection may be approved are laid down, as above stated, in section 7 of the Taylor Grazing Act as amended and in the forest lieu laws; and they concern nothing but the status and character of the lands to be selected and the propriety of the proposed use in its relation to the purposes of the withdrawal. Nor insofar as the Department knows is there any provision in the War Powers Acts or in any other statute which would authorize the President or his executive representative, the Secretary of the Interior, to consider the instant selection with reference to the war and the qualifications of applicant's transferee, despite the importance of both those factors, rather than with reference to the classification specifications by the statutes mentioned.

Appellant charges the decision with error in holding that the lands here selected were not of the class and character required by the 1897 act as amended by the act of June 6, 1900. He says that he had acquired a right to select "vacant land open to settlement" under the act of June 4, 1897; that his right had "crystallized" under that act; that the provisos of the act of June 6, 1900, and March 3, 1905, intended his right to be unaffected by subsequent legislation; and that he is now entitled to select the same kind of lands that he chose in his original selection. This contention is without merit. The legislative history of the act of June 6, 1900, shows the intention of the Congress to restrict the character of lands in all selections initiated after October 1, 1900; and analysis of the terms of the act shows that they express this intention.

As has been seen, the 1897 act had permitted the selection of any "vacant land open to settlement." This provision the act of June 6,

¹⁴ The company's long-term logging policy is described in a supporting statement by the company's land agent, George W. Beardmore, attached to this file, Coeur d'Alene 013863.

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1900 (31 Stat. 614), amended, considerably restricting in character the land that might be chosen. It provided—

That all selections * * * shall be confined to vacant surveyed non-mineral public lands which are subject to homestead entry * * *: *Provided*, That nothing herein contained shall be construed to affect the rights of those who, previous to October first, nineteen hundred, shall have delivered to the United States deeds for lands within forest reservations and make application for specific tracts of lands in lieu thereof.

The object of this amendment, it should be recalled, was to curb the vicious exploitation of the best timbered public lands situate outside forest reserves which the 1897 act had made possible through its failure adequately to restrict the character of lands to be selected. The Department felt that the definition of exchange land as "vacant land open to settlement" offered too wide a choice and should be limited; and it was particularly desirous of preventing further selection of unsurveyed lands, which one of its early decisions¹⁵ had held to be permitted by the act. In recommending such limiting legislation to the Senate, the Department stated:

To permit the selection of unsurveyed lands enables persons to go far in advance of surveys and cull out the most valuable tracts of timber lands before they are subject to entry and sale under other laws, and at the same time encourages speculation, which in itself is contrary to the general purpose of the laws pertaining to the disposal of public lands, and is therefore most objectionable. [S. Doc. 187, 56th Cong., 1st sess.]

As to this the House Committee on Public Lands said in its report of May 23, 1900,¹⁶ that to allow the selection of unsurveyed lands was a departure from the almost uniform policy of the Government; that it had not been the intention to allow it but it had been done. The committee therefore reported a bill, H. R. 11841, to prevent the evil, designating *May 23, 1900*, as the date after which no more applications for lands of the character permitted by the act of 1897 might be made. This bill was later incorporated into the Sundry Civil Appropriations Act of June 6, 1900, and was passed without change save as to the date of effectiveness of the new restrictions. This date was changed from May 23, 1900, to October 1, 1900.

On June 6, 1900, on the floor of the House, Representative Lacey expressed his fear that this extension of the period during which lands might continue to be selected under the definition of the 1897 act would permit too great exploitation. In answer, Representative McRae, one of the House Managers on the Conference Committee,

¹⁵ *F. A. Hyde, et al.* (On Review), 28 L. D. 284 (April 14, 1899).

¹⁶ H. Rept. 1700, 56th Cong., 1st sess. to accompany H. R. 11841, House Reports, vol. 6, Ser. No. 4026.

explained that the provision as agreed to by the Conference Committee would give the owners of land inside forest reserves *only until October 1, 1900*, to select lands *under the definition of the 1897 act*, in particular, *unsurveyed lands*, and that without this extension from May 23 to October 1 it would have been impossible to obtain the necessary legislation,¹⁷ his implication being that the Senate conferees would not have agreed to it. The legislative history therefore shows the clear intention of the Congress that *until October 1, 1900*, selections might continue to be made under the broad definition of the 1897 act; but that *after October 1, 1900*, all selections initiated must be of the restricted character prescribed by the narrower definition of the act of June 6, 1900.

The act itself expresses this intent. Its first sentence changed the character of the land that might be selected. Its second sentence deferred the effectiveness of the change until October 1, 1900, in cases which met certain conditions. This sentence, the proviso, in effect said that the right of an owner of land in a forest reserve to apply for land of the character defined by the 1897 act was not to be affected by the 1900 amendment if such owner delivered a deed of relinquishment and made application for a specific tract of land *before the dead line of October 1, 1900*. The implication of course is that upon the dead line of October 1, 1900, the change and restrictions wrought by the 1900 act would become effective and the right to apply for lands of the broad character permitted by the 1897 act would no longer exist.

Construing this proviso in *Gary B. Peavey*, 31 L. D. 186 (January 2, 1902), the Department considered that selections under the 1897 terms, if they were complete in all respects and were filed before the October 1 dead line, would be exempt from the amendment, other circumstances permitting. But it also held that the proviso's use of the term "application" instead of the term "selection" was significant and permitted an application which had been filed before the dead line but which lacked one or more of the required supporting papers and was therefore an incomplete selection to be completed or perfected within a reasonable time after the dead line, other circumstances then permitting. The Department then defined the right which was not to be affected by the restrictions of the 1900 act as

* * * a right to carry to completion, as if that act had not been passed, an incomplete selection initiated in the manner named in the act and pending undisposed of October 1, 1900, when the prohibition against the selection of unsurveyed lands became effective.

¹⁷ Cong. Rec., 56th Cong., 1st sess., p. 6822.

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Neither in the statute nor in this decision is there any suggestion that if a selection, whether complete or incomplete, initiated under the terms of the 1897 act and pending undisposed of on October 1, 1900, were later to be rejected for no fault of the selector, *another selection under the terms of the 1897 act* might be made to replace it. Nor of course would there be any authority for importing such a provision into the statute in change of its meaning.¹⁸

Accordingly, all selections initiated *after* October 1, 1900, were required to be made under the 1897 act *as amended* and to be subject to the 1900 restrictions. In the first place, it is a basic rule, implicit in all forest lieu regulations, that *the land selected must at the time of the selection be of the character subject to selection* as prescribed by the applicable statute.¹⁹ In the second place, after October 1, 1900, only lands of the character described in the act of June 6, 1900, were to be subject to selection. Regulations²⁰ explaining that act and issued on July 7, 1902, specifically provided:

4. Selections *after October 1, 1900*, are authorized to be made *only* of vacant, surveyed, nonmineral lands which are subject to homestead entry. [Italics supplied.]

In the third place, by the Commissioner's circular²¹ of May 16, 1905, these instructions of July 7, 1902, were made applicable to any selections made under the proviso of the act of March 3, 1905. This act was entitled "An Act Prohibiting the selection of timber lands in lieu of lands in forest reserves" and was worded as follows:

That the Acts of June fourth, eighteen hundred and ninety-seven, June sixth, nineteen hundred, and March third, nineteen hundred and one, are hereby repealed so far as they provide for the relinquishment, selection, and patenting of lands in lieu of tracts covered by an unperfected bona fide claim or patent within a forest reserve, but the validity of contracts entered into by the Secretary of the Interior prior to the passage of this Act shall not be impaired: *Provided*, That selections heretofore made in lieu of lands relinquished to the United States may be perfected and patents issue therefor the same as though this Act had not been passed, and if for any reason not the fault of the party making the same any pending selection is held invalid another selection for a like quantity of land may be made in lieu thereof.

The Commissioner's directions to the local land officers on May 16, 1905, regarding the proviso were in part as follows:

* * * *Should application be presented under this provision of the law you will be careful to see that same is in strict compliance with the instructions of July 7, 1902 (31 L. D. 372),* * * *.

¹⁸ *Newhall v. Sanger*, 92 U. S. 761, 765.

¹⁹ *Instructions of March 6, 1900*, 29 L. D. 578, 580; and *Instructions of March 19, 1901*, 30 L. D. 538, 539.

²⁰ *Instructions of July 7, 1902*, 31 L. D. 372, 373.

²¹ *Instructions of May 16, 1905*, 33 L. D. 558, 559.

The 1902 regulations are therefore still in effect. They are supplemented by all previous instructions and rules not in conflict with them, by the Instructions of May 16, 1905, and by section 7 of the Taylor Grazing Act, and they are operative upon all so-called "re-selections" under the 1905 act. It is therefore to be emphasized that any application whatever made after October 1, 1900, whether original selection or reselection in lieu thereof, must be "confined to vacant surveyed nonmineral public lands which are subject to homestead entry." To this requirement there is no exception.

This ruling is especially to be noted in view of the misconception sometimes met that the repeal proviso creates a new right of exchange and places no limitation upon the character of lands that may be selected, merely requiring that the lands shall not exceed in area the base surrendered. There is no ground for this idea. The law is designed to end these exchanges. The proviso does not nullify the intent of the law. It creates no new right of exchange. Instead, it conserves the original right of exchange, acquired by relinquishment of base land, whenever the original selection made in exercise of it and pending unadjudicated on March 3, 1905, later fails *without the selector's fault*. It then permits a second attempt to satisfy the original right through the making of a substitute selection for the one that failed. Moreover, by providing that *the substitute selection shall be for a quantity of land like the quantity in the selection which failed and is replaced*, the statute ensures against a new exchange for excess or unassigned base, namely, base that had been relinquished to the Government but had never been offered in any selection and therefore remained unsatisfied at repeal. For example, a rejected selection of 200 acres may not be replaced by one of 320 acres, even though the applicant have 320 acres of base outstanding. The selection of 120 additional acres would constitute a new exchange. The limiting phrase prevents it and is supporting evidence of the intention of the repealer to permit no exchange at all after March 3, 1905, save in the three carefully defined classes of exceptions.²²

From this review of the controlling law it is apparent that if on October 1, 1900, Ramsey's application of December 18, 1899, for "vacant land open to settlement" had been an incomplete selection because lacking some requisite paper such as a nonmineral affidavit and if on October 1, 1900, it had been pending unadjudicated, Ramsey

²² *Robert Leslie*, 34 L. D. 578, 580 (April 24, 1906); *Ehalaenen v. Santa Fe Pacific R. R. Co.*, 42 L. D. 574, 577 (December 17, 1913); *Frederick W. Kehl*, 35 L. D. 116 (August 13, 1906); *Santa Fe R. R. Co., et al.*, 40 L. D. 360, 362 (December 18, 1911); *W. E. Moses Land Scrip and Realty Co.*, 34 L. D. 458, 461 (February 24, 1906); *Instructions of May 16, 1905*, 33 L. D. 558, 559, last paragraph.

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would have had the right under the 1900 proviso to carry his application to completion after October 1, 1900, other circumstances permitting. It is clear, too, that he would have had this right even if he had delivered his base deed and made his application for 1897-defined land *as late as the last working weekday of September 1900*. But in the event of the rejection of such selection, in whole or in part, *on or after* October 1, 1900, any selection that he might have been permitted to make in its stead after October 1, 1900, would have been subject to the restrictions of the 1900 act. He could not again have chosen lands of the type permitted by the 1897 act. Moreover, the same limitation would rest upon any valid privilege of reselection which he might later acquire under the repeal proviso of 1905. For any such reselection would of necessity be made after October 1, 1900.

In the circumstances, however, Ramsey could not have a valid privilege of reselection under the repeal proviso. The last paragraph of the Commissioner's circular of May 16, 1905,²³ instructed registers as follows:

The repealing act makes no provision for cases where lands within forest reserves may have been reconveyed to the United States, but no selections made in lieu thereof, or where such selections if made were finally rejected and canceled prior to March 3, 1905. [Italics supplied.]

Appellant's statement that the selection was canceled for no fault of Ramsey's but for conflict with a selection by the Northern Pacific Railway Company and was therefore pending at repeal is incorrect as to both the facts and the law. The point was thoroughly discussed in the decision of December 26, 1942. Ramsey's selection was lawfully rejected for Ramsey's fault, his failure to post and publish notice of the selection. It was canceled on November 21, 1904, more than three months before March 3, 1905. Appeal was possible. Appellant admits that none was taken. A party who fails to appeal is deemed to acquiesce in the judgment below. Nothing in connection with the case was pending adjudicated on March 3, 1905. There could be no right of reselection.

Twenty-seven years later when Jeremiah Collins filed his petition for the exercise of supervisory authority in the interest of the heirs of Ramsey's alleged assignee, Philbrick, it was the Department's privilege at its pleasure to extend liberal treatment to appellant by entertaining the petition filed, even though there was no emergency suggesting the propriety of such a petition. But there was no authority in the Department to accord the privilege of reselection

²³ 33 L. D. 558, 559.

in circumstances other than those prescribed by the Congress. The Department on December 26, 1942, held the decision of August 6, 1931, clearly in error not only in finding the 1904 cancellation improper but in failing to find that even had the alleged right been valid in 1905 it would have been invalid in 1931 because of the interim elimination of the base lands from the reserve.

Appellant declares that the Department has no right in equity to set the 1931 decision aside without an appeal or action of any kind. This argument is absurd if it means that the Department has no authority either in law or in equity to correct its own mistakes *sua sponte* or that one unauthorized act requires that the wrong thereby initiated be consummated by succeeding acts equally unauthorized. As long as public lands remain under the care and control of the land department its power to inquire into the extent and validity of rights claimed against the Government and to correct its own errors does not cease.²⁴ As Mr. Justice Lamar said in his much-quoted decision in *Knight v. United States Land Ass'n*, 142 U. S. 161, 181—

The Secretary is the guardian of the people of the United States over the public lands. The obligations of his oath of office oblige him to see that the law is carried out, and that none of the public domain is wasted *or is disposed of to a party not entitled to it*. He represents the Government, which is a party in interest in every case involving * * * disposal of the public lands. [Italics supplied.]

Moreover from the Secretary's power of supervision over the subject matter it results that—

In the administration of the laws providing for the disposal of the public lands, whenever a question is presented to the Secretary of the Interior for his determination, *he may review, revise, annul, or affirm* any and all proceedings in the Department having for their ultimate object the alienation of any portion of the public lands and determine every question presented by the record of the case *irrespective of the manner or mode by which the case is presented for his determination*. [Italics supplied.]²⁵

In this case the application itself brought the erroneous decision to the Department's notice. Inquiring into it, the Department recalled and vacated it in the public interest, finding Ramsey in nowise entitled to the right claimed.

Appellant does not mention the exclusion of the base lands from the reserve in 1917 and the bearing of that action on any right of reselection that might have existed on March 3, 1905. Despite the

²⁴ *Harvey M. La Follette*, 26 L. D. 453, 464; *Michigan Land and Lumber Co. v. Rust*, 168 U. S. 589; *Northern Pacific R. R. Co. v. Bass* (On Review), 14 L. D. 443, 444.

²⁵ *McReynolds v. Weckey et al.*, 39 L. D. 498, 501 (1911); citing *Pueblo of San Francisco*, 5 L. D. 483, 494; *Knight v. Land Ass'n*, 142 U. S. 161, 178; *Doll v. Jones*, 34 L. D. 82.

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fact that the statutory reason for consummation of an exchange has long since ceased, he assumes the existence of a valid right of reselection and says that there is no statute of limitations applicable to it and no law warranting the claim, as between Government and selector, that any right has been barred by lapse of time. He admits delay in the making of the reselection but says that the history of the Philbrick family warranted the delay and *offsets* any charge of "laches." He also says that the 1931 decision "cured" the delay. Obviously, appellant mistakes the point of the decision, misunderstanding not only the requirements as to when selections and reselections should be filed but the reasons for the rules. It is useful therefore to review the Department's interpretation of the statute as to this point.

Implicit in the act of June 4, 1897, creating the right of exchange here involved is the basic requirement that at the time of the completion of the selection the base lands must be subject to relinquishment, that is, they must be within a forest reserve.* But the same act also gave the President power to change reserve boundaries and to exclude therefrom lands found unadapted to forest reserve purposes. From the beginning many such changes were under consideration and were being made. There was therefore no certainty that the forest reserve status of base lands existing at the initiation of an exchange would continue until the completion of a selection. Obviously, if the base lands were to be eliminated before the selection was completed, they would cease to be subject to relinquishment and no exchange could be made, despite the conveyance to the United States. Hence any procrastination in the making of a selection was fraught with risk of defeat of the right. Moreover, there was no legislation permitting restoration of relinquished but invalid base from the United States to the prior owner.²⁶

The Department considered that such a situation, injurious to the owner and embarrassing to the Department, should be avoided through expedition in the completion of a selection once the exchange had been initiated by relinquishment. To prevent or discourage hazardous delay, the very first regulations²⁷ required relinquishment and selection to accompany each other. This rule was emphasized in the decisions. In the *F. A. Hyde* case the Department used the following strong terms:

* See footnote 13.

²⁶ Nor was there any such law until passage of the act of September 22, 1922 (42 Stat. 1017). See also act of April 28, 1930, ch. 219, sec. 6 (46 Stat. 257, 43 U. S. C. sec. 872).

²⁷ *Regulations of June 30, 1897*, paragraphs 15 and 16, 24 L. D. 589.

A case is not properly presented for the favorable action of the land department * * * until there is filed a relinquishment * * * and a selection * * * in lieu thereof. *The officers of the land department are not authorized to accept, consider or pass upon a relinquishment * * *, except in connection with a proffered * * * selection of other lands in lieu thereof.* [Italics supplied.]²⁸

In *William S. Tevis*²⁹ the Department said:

The Department cannot escape the conviction, upon careful consideration, *that the act contemplates and that good administration and the best interests of all concerned in the exchange of lands so provided for require that the steps necessary to complete such exchange, when once initiated, be concluded as promptly as possible, and that as contributory to that end an application to select lieu lands should accompany the papers filed to effect a relinquishment to the United States of the land upon which the lieu selection is based.* [Italics supplied.]

The Department moreover has reinforced the rule by directing³⁰ the General Land Office to *require* that selections be filed in the proper land office within a reasonable time after recordation of the deed of relinquishment to the United States on the records of the county where the relinquished lands are situate, the term "reasonable" having reference to the period within which an applicant may *reasonably in the circumstances of his case* be expected to complete his selection.

These requirements are as applicable to reselections as to selections. In the first place a reselection is only a second selection in exercise of the original right and as shown above is expressly required to be in strict compliance with the rules existing at repeal. In the second place a reselection is just as subject as a selection to the consequences of reserve boundary changes. It runs exactly the same risk of defeat by exclusion of its base lands. In his own interest therefore a selector should not unduly delay or indefinitely postpone the filing or the completing of a second selection but should bring the procedure to an expeditious conclusion once he reinitiates his right by requesting its confirmation. As the Department said in the *Tevis* case, *supra*, *the act contemplates* the promptest action possible in the circumstances.

There is a further requirement as to the time of making reselection. The Department has ruled that in the absence of an application to select a specific tract of land the Department will not attempt to determine whether a selector is entitled to make further selection under the repeal proviso of 1905. Its view is as follows:

The right to make a new selection given by the act of March 3, 1905, *supra*, is so closely akin in principle to the right of second entry accorded by various

²⁸ *F. A. Hyde et al.*, 28 L. D. 284, 286.

²⁹ *William S. Tevis*, 29 L. D. 575, 577 (February 28, 1900).

³⁰ *Mary E. Coffin*, 31 L. D. 175, 178 (Dec. 19, 1901).

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statutes as to make the established practice relative to second entries controlling in cases where applications for a new selection are presented; and it has long been a well-established rule of administration from which there is no departure that an applicant's right to make a second entry will not be considered and adjudicated until he has selected and applied to enter a particularly designated tract.³¹

This rule is still in force and the decision of August 6, 1931, erred in not applying it when Jeremiah Collins requested the right of reselection but did not apply to select a particular tract.

It transpired that even the promptest action by the selector in pursuance of these precautionary regulations could not wholly ensure the exchange right against defeat by exclusion of the base before completion of the selection. In the case of Mrs. Mary E. Coffin³² there had been full compliance with the statute and the rules thereunder; also prompt performance of the preliminary requirements, only 21 days having passed between initiation of the exchange by recordation of the relinquishment deed in the county of the base lands and presentation of the relinquishment, the selection and all other requisite papers to the land office. But in that brief interval, only 15 days after recordation and six days before presentation of the complete selection, the contingency happened. The base lands were excluded from the reserve. The applicant had parted with legal title. In the absence of appropriate legislation she was in no legal posture to recover it or to cancel her deed of relinquishment.

In the absence of regulations anticipating this situation, the Department considered it within the Secretary's competency to do justice. In the serious cloud cast on Mrs. Coffin's title, in impairment of her opportunities to sell or otherwise dispose of her lands and in the lack of legal means to correct a situation which had resulted through no dereliction or delay on the selector's part the Department found equities justifying completion of the exchange. This it therefore permitted.

It also directed that regulations be prepared to cover future cases presenting like facts. In effect, the purpose of these was to provide that, even though the base land were not within a reserve at the time of the selection as the statute required, the exchange might be completed if the conditions of the Coffin case obtained, that is, (1) if all the proceedings were regular and in full conformity with the act and the rules; (2) if the base had been within a reserve when the relinquishment was recorded; and (3) if the applicant had filed the com-

³¹ *Alamagordo Lumber Co.*, D-36789 (unreported), decision of February 19, 1919, *Letu Selection 12391*, in National Archives. Also G. L. O. Circ. No. 354, 43 L. D. 408.

³² *Mary E. Coffin*, 31 L. D. 175 (December 19, 1901).

plete selection within a reasonable period after recordation of his deed, the term *reasonable* having reference to the circumstances of the case. In addition, the Department ordered that the regulations *require* the selections to be perfected within a reasonable time.

The regulations drawn in pursuance of this directive are paragraphs 10 and 11 of the Instructions of July 7, 1902.³³ These paragraphs, the facts, the ruling and the directions in Mrs. Coffin's case are to be read together as giving the complete rule for any case in which the base lands are eliminated from the reserve before presentation, simultaneously, of relinquishment and complete selection. Unless the facts are similar to those in Mrs. Coffin's case and unless all the conditions of the rule are fulfilled, there are no equities to be considered and elimination of the base defeats the selection. In particular, the complete selection must be presented with the relinquishment within a period reasonable in the circumstances of the case. Alone, the fact that the base was included within a reserve when the deed of relinquishment was recorded will not avail.

In the case of reselections, if there were an interim between reinitiation of the right by request for its confirmation and the perfecting of the selection and if exclusion of the base occurred in that period, there seems to be no reason why, *rebus sic stantibus*, the exchange should not be completed, provided the base was within a reserve when the right was reinitiated, provided the reselection was perfected within a reasonable period after request for confirmation was made, and provided all other proceedings were regular and in full conformity with the rules.

Obviously however with the enactment of laws providing machinery for the restoration of relinquished lands to their owners conditions would not remain the same. *Rebus non sic stantibus*, the major equity determining the decision in Mrs. Coffin's case would disappear and with it the necessity for exceptional treatment. It follows that the rule resulting from the *Coffin* case would not have been applicable to reselections during the life of the relief act of 1922.* Nor can it be considered as having been applicable to them since passage of the reconveyance act of 1930.*

³³ Instructions of July 7, 1902, 31 L. D. 373.

Paragraphs 10 and 11 read as follows:

"10. Should a selection be presented, based upon a relinquishment or reconveyance to the United States of lands which are not at the date of the filing of such selection within the limits of a forest reserve, the selection will be rejected, unless it appears that such lands were within the limits of such a reserve at the date of the recording on the proper records of such relinquishment or reconveyance.

"11. Selections should be filed in the proper land office within a reasonable time after the relinquishment or reconveyance has been recorded in the manner indicated."

* See footnote 26.

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It need hardly be observed that in the event of an exclusion of base lands before reinitiation of the right by request for its confirmation there could have been in the past and there can be today no reason at all for its confirmation. There could be no equities to be considered; the law requiring base lands to be within a reserve at the time of the selection would have to be obeyed; no exchange could be made; the right of reselection, even if valid on March 3, 1905, would have to be denied.

It remains to point out that the regulations requiring the presentation of relinquishment and selection together and prompt completion of the selection after initiation of the right interfered with the plans of public land companies and speculators and for a considerable period were disregarded by them. Treating the exchange right as scrip, they wished to be able to make selections as and when they chose. It suited them to surrender a very large number of base tracts at one time and by a single deed, then to exhaust this base at their convenience as opportunity might arise to sell at advantageous prices fractional selection rights based upon it.

The instant case illustrates the procedure which they followed. As has been stated,³⁴ the 320-acre base here offered was part of 4,720 acres which Ramsey conveyed to the United States on October 2, 1899, by a single deed with a single general abstract of title. Lieu Selection No. 1559, to which this particular base was assigned, was not made until December 18, 1899, and was not the first to be based on the 4,720-acre relinquishment but was one of the "additional" selections made thereon. The reselection made herein to replace an additional selection is therefore itself an additional selection.

Despite the regulations, the risks involved by potential boundary changes and the departmental warning in the *Hyde* case, this practice was followed by many applicants and tolerated by the land office for over two years. Early in 1900 however the Department formally criticized the practice as erroneous and unauthorized, ordered its discontinuance and gave directions for the disposition of all these exceptional cases in which relinquishments had been satisfied only in part.³⁵

These directions allowed those who had unsatisfied base outstanding time within which to exhaust their claims but notified them that

³⁴ Decision of December 26, 1942, *supra*, p. 289, fn. 32.

³⁵ See *General Land Office Instructions of January 16, 1900*, to local land officers, not published but quoted in 29 L. D. 579, at head of page; *William S. Tevis*, 29 L. D. 575 (February 28, 1900); *Instructions of March 6, 1900*, 29 L. D. 578; and *Instructions of July 7, 1902*, 31 L. D. 373, par. 8.

delay in making the necessary additional selections would be at their own risk. Explaining this risk, the Instructions said:

Not only are the boundaries of forest reserves subject to change as pointed out in the decision in the case of Tevis, *supra*, but bills are now pending before Congress the purpose of which is to modify the conditions under which lieu selections based upon relinquishments of lands within such boundaries may be allowed. *Additional selections of lands in satisfaction of relinquishments previously made will be subject to all changes occurring in the meantime both in the reservation boundaries and in the law governing the right to make selection of lieu lands.* [Italics supplied.]³⁰

These directions also specifically provided that land offered as base for any *additional* selection must be within a forest reserve at the time of the selection. Otherwise the additional selection would be invalid. If Ramsey had a valid right of reselection this provision would not be inapplicable to his instant selection, which has been shown to be an additional selection.

From this review of the Department's interpretation of the statute as to when a selection must be made, it is apparent that from the very beginning the Department has been concerned with the possibility of defeat of the exchange right by exclusion of the base lands from the reserve before the perfecting of the selection and has sought to safeguard the right against this contingency. It is clear that whatever the type of selection involved, regular, additional, or second selection under the repeal proviso, the Department has held it essential that the relinquishment and the complete selection be presented together and that, once initiated or reinitiated, steps toward an exchange be concluded as promptly as possible in the circumstances of the case. In the event of exclusion of the base before selection, the fact that the base was in a reserve when the deed of relinquishment was recorded will not avail the applicant who sleeps on his right or delays his selection, his additional selection or his reselection. With exclusion of the base the reason for the exchange disappears. Today, restoration of the base to its owner has become possible. Equities like those in Mrs. Coffin's case cannot exist. The right initiated by relinquishment must be held defeated.

Appellant's claim that lapse of time does not affect a dormant selection right adversely is therefore clearly seen to be invalid. Here, Ramsey's base was excluded from Sequoia National Forest in 1917. Not until 1931 did Ramsey seek the right of reselection. Not until 1939 did he seek to exercise the right accorded. In those circumstances not even a valid right could have survived and Ramsey had no valid right, as has been seen.

³⁰ Instructions of March 6, 1900, 29 L. D. 579.

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For all the above consideration the Department finds no reason for disturbing the decision of December 26, 1942. It adheres to its conclusions that Ramsey's first selection was lawfully canceled in 1904; that it was not pending on March 3, 1905; that no right of further selection existed; and that the decision of August 6, 1931, erred in holding otherwise and in according the right. The Department continues of the view that the 1931 decision further erred in failing to find that even if in 1905 the right of further selection could lawfully have been accorded the right would have been defeated by the exclusion of the base in 1917 and that therefore the Department was in 1931 without authority to confirm the right. Finally, the Department holds to its opinion that even if appellant's alleged right of reselection were valid, the lands here selected would not be proper for disposal in its satisfaction, not being of the character subject to selection under the lieu selection laws³⁷ and, further, could not be restored to entry, being affected with a paramount public interest.

The motion is

Denied.

AUTHORITY OF SECRETARY TO GRANT REVOCABLE RIGHTS-OF-WAY ACROSS INDIAN ALLOTMENTS

Opinion, January 19, 1943

TRANSMISSION LINES—RIGHTS-OF-WAY—ALLOTTED INDIAN LANDS—GENERAL SUPERVISORY AUTHORITY.

The Secretary of the Interior derives no authority from section 1 of the act of July 9, 1832, as amended (4 Stat. 564, 25 U. S. C. sec. 2); section 17 of the act of June 30, 1834 (4 Stat. 735, 738, 25 U. S. C. sec. 9); and section 12 of the act of February 14, 1903 (32 Stat. 825, 830, 5 U. S. C. sec. 485), to grant revocable permits for the construction of transmission lines across Indian allotments.

The "general supervisory authority" derived from these acts is simply a power to take administrative measures necessary for the execution of responsibilities and authorities otherwise more definitely fixed by statute or treaty.

If the acts of February 15, 1901 (31 Stat. 790, 43 U. S. C. sec. 959), and March 4, 1911 (36 Stat. 1253, 43 U. S. C. sec. 961), are not applicable to allotted Indian lands, it will be necessary for those desiring to use allotted Indian lands for transmission lines to obtain easement deeds.

³⁷ See *Allison and Johnson*, decision of August 21, 1943, *supra*, pp. 236-239.

GARDNER, *Solicitor*:

I am returning [to Commissioner of Indian Affairs] for further consideration the attached letter to the Superintendent of the Five Civilized Tribes Agency regarding the application of The Empire District Electric Company for permission to construct a transmission line across certain Indian allotments.

I do not agree with the statement contained in the last sentence of the letter that if the United States Supreme Court does not reverse the decision of the Circuit Court of Appeals for the Tenth Circuit in the case of *United States v. Oklahoma Gas & Electric Co.*, 127 F. (2d) 349,* the Secretary of the Interior may issue a revocable permit for the use of the land in the manner contemplated "under his general supervisory authority over Indian affairs." This office has recently pointed out that what is sometimes loosely spoken of as the "general supervisory power" derived from section 1 of the act of July 9, 1832, as amended (4 Stat. 564, 25 U. S. C. sec. 2); section 17 of the act of June 30, 1834 (4 Stat. 735, 738; 25 U. S. C. sec. 9); and section 12 of the act of February 14, 1903 (32 Stat. 825, 830, 5 U. S. C. sec. 485), is simply a power to take administrative measures necessary for the execution of responsibilities and authorities otherwise more definitely fixed by statute or treaty and that these general statutes cannot be relied upon as grants of new powers unrelated to the statutory responsibilities of the Department. (See Solicitor's opinion approved August 24, 1942, 58 I. D. 103, *supra*.)

If the Supreme Court should determine that the acts of February 15, 1901 (31 Stat. 790, 43 U. S. C. sec. 959), and March 4, 1911 (36 Stat. 1253, 43 U. S. C. sec. 961), are not applicable to allotted Indian lands, and in the absence of other statutory authority to permit the crossing of allotted lands by transmission lines, I can see no way in which the Secretary might use his "general supervisory authority" to do something which the court declares he has no authority to do. That would be the effect of issuing a revocable permit, not issued as an administrative measure in connection with some other statutory authority, after the court had decided that a grant of a right-of-way could not be issued.

In my memorandum to the Assistant Secretary of October 16, 1942, regarding the revision of the regulations governing rights-of-way, I called attention to the fact that in view of the above decision it would be necessary for those desiring to use allotted lands for transmission lines to obtain easement deeds and I am aware of no other way in which permission may be granted for the use of these lands for such purposes at the present time.

* * * * *

* Affirmed Feb. 15, 1943, 318 U. S. 206. [Ed.]

CHARLES J. DORFMAN

Decided January 23, 1943

CONTRACTS—EXTRA WORK—ADDITIONAL COMPENSATION—UNLIQUIDATED DAMAGES.

A Government construction contractor claimed additional compensation over the agreed contract price because delay in the supplying of timber piling by the Government allegedly disrupted his work program and increased costs for labor, materials, and overhead. *Held*, (1) that the Government is not obligated, in the absence of an express provision in the contract, to do any act so that work contracted for should at all events be completed within the contract time, or so that it can be carried on in the most efficient and least costly manner, (2) that where a contractor performs within the time specified only the work contracted for, no claim for damages because of alleged extra work may be administratively considered, (3) that even where a contractor shows that he has in fact performed extra work under a contract with the Government, recovery therefor cannot be had unless such work was ordered in the manner prescribed by the contract, (4) that a claim for additional compensation, calculated after the completion of the work under a contract, cannot be allowed in any event, since it is in form a claim for unliquidated damages which administrative officers of the Government are without authority to consider. *Wm. Cramp & Sons v. United States*, 216 U. S. 494, 500.

FORTAS, *Under Secretary*:

On July 11, 1940, the United States entered into Contract No. I2r-11605 with Charles J. Dorfman, of 124 North La Brea Avenue, Los Angeles, California, hereinafter referred to as the contractor, for the construction of pumping plant No. 1, Gravity Main Canal, Bureau of Reclamation Gila project, Arizona, under items 1-55, inclusive, Schedule of Specifications No. 911. The original contract price was \$265,743.70, and work was to be satisfactorily completed within 400 calendar days from receipt of notice to commence work. Receipt of formal notice to proceed was acknowledged by the contractor on August 28, 1940, thus fixing the completion date for work under the contract as October 2, 1941. The work was satisfactorily completed within the time limit set by the contract.

On November 6, 1941, in connection with the final payment, the contractor executed a release of the contract. He noted thereon, however, the following exception: “* * * an amount of \$12,595.55, claim for which amount was filed by letter dated October 20, 1941.” The amount claimed was rejected in its entirety by the contracting officer in a finding of facts, dated October 20, 1942. The contractor has appealed to the head of the Department, as is provided for under Article 15 of the contract. The contracting officer’s findings of fact, from which the appeal is taken, read in part as follows:

FINDINGS OF FACT * * * The contractor completed work under the contract within the contract time, and no liquidated damages have been assessed against him. No request for an extension of time was received. * * *

SUMMARY OF FINDINGS * * * (a) The delivery of timber piling under invitation 24, 753-A was delayed by unusually severe weather conditions, resulting in a delay to the construction contractor.

(b) The actual period during which no piles were available for driving was 7 days; however, pile-driving operations were suspended 14 days.

(c) Inasmuch as the subject contract makes no provision for the payment of damages by the Government on account of delays for which it is responsible, and in view of the established rule that administrative officers of the Government have no jurisdiction to determine claims for unliquidated damages, which is the nature of the demand herein considered, the claim of the contractor must be denied.

From the record now before the Department it appears that the contractor was in fact required to vary his work schedules in connection with his pile-driving operations by reason of delay on the part of the Government's pile supply contractor. It appears that an invitation for bids to supply the timber piles to be used by the contractor was issued on July 22, 1940, and that the contract thereunder was awarded to B. F. Vreeland, of Denver, Colorado, on August 3, 1940. Under the terms of the contract with Vreeland, it appears, the L. N. Tompkins Lumber Company, of Hillsboro, Oregon, subcontractor of Vreeland, was to have shipped one-half of the timber piles on or before September 4, 1940, and the entire quantity by September 19, 1940. The contracting officer states that "due to circumstances beyond the control of the supplier, delivery could not be made as scheduled." By findings of fact dated May 20, 1941, he found that the delay was "due to excusable causes under the supply contract" and extended the time for shipment 33 days. In this connection he states that "delivery of this material to the construction contractor [Dorfman] was delayed as claimed by him."

On August 15, 1940, the contractor's superintendent submitted to the Bureau of Reclamation a construction program which contemplated driving piles during the period September 1, 1940 to October 5, 1940. The contractor's work record discloses that pile-driving operations were begun on September 5, 1940, and continued until October 14, 1940, when operations were necessarily suspended due to nondelivery of piling, that during the period September 30, 1940 to October 14, 1940, the contractor was operating on a two-shift basis, that on October 21 and 24, 1940, additional shipments of 115 piles and 60 piles, respectively, were received, that on October 29, 1940, the contractor reassembled his pile-driving crew and resumed operations, and that all pile-driving work was completed on November 7, 1940, without further delays. The actual period during which pile-

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driving operations were suspended is shown to have been 14 days, during 7 days of which time no piles were available.

The contractor's letter of October 20, 1941, in the main outlines difficulties alleged to have resulted from a disrupted work program which he attributes to the fact that delay in the delivery of the piling necessitated deviation from the construction program, that due to adverse weather conditions a longer period of time than anticipated was required to drive the piles and to conduct other work on the project, that he was obliged to employ double and triple work shifts, resulting in increased cost because of the inefficiency of such practice, all of which, he alleges, considerably increased his costs for labor, materials, and overhead.

I

The terms of the contract in question strictly limit the time of the contractor and provide that liquidated damages shall be paid by him for his delays. No provision is made for awarding damages, liquidated or otherwise, for or on account of delays of the type alleged to have been caused by the Government in this case. The only provision of this nature is one permitting the contracting officer to extend the time for completion of the contract in the case of unavoidable delays which are unforeseeable and beyond the control of and not due to the fault or negligence of the contractor, or which are caused by acts of the Government. There is no express provision therein obligating the Government to do any act so that the work should at all events be completed within the contract time, or so that it could be carried on in the most efficient and least costly manner. The contractor's suggestion that a change order be issued "as and for a changed condition" indicates apparent confusion with regard to the application of Articles 3 and 4 of the contract. These articles read as follows:

ARTICLE 3. *Changes.*—The contracting officer may at any time, by a written order, and without notice to the sureties, make changes in the drawings and/or specifications of this contract and within the general scope thereof. If such changes cause an increase or decrease in the amount due under this contract, or in the time required for its performance, an equitable adjustment shall be made and the contract shall be modified in writing accordingly. No change involving an estimated increase or decrease of more than Five Hundred Dollars shall be ordered unless approved in writing by the head of the department or his duly authorized representative. Any claim for adjustment under this article must be asserted within 10 days from the date the change is ordered: *Provided, however,* That the contracting officer, if he determines that the facts justify such action, may receive and consider, and with the approval of the head of the department or his duly authorized representative, adjust any such claim asserted at any time prior to the date of final settlement of the contract. If the parties fail to agree upon the adjustment to be made the

dispute shall be determined as provided in article 15 hereof. But nothing provided in this article shall excuse the contractor from proceeding with the prosecution of the work so changed.

ARTICLE 4. *Changed conditions.*—Should the contractor encounter, or the Government discover, during the progress of the work subsurface and/or latent conditions at the site materially differing from those shown on the drawings or indicated in the specifications, or unknown conditions of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications, the attention of the contracting officer shall be called immediately to such conditions before they are disturbed. The contracting officer shall thereupon promptly investigate the conditions, and if he finds that they do so materially differ the contract shall, with the written approval of the head of the department or his duly authorized representative, be modified to provide for any increase or decrease of cost and/or difference in time resulting from such conditions.

Article 3 clearly is in no way applicable to the circumstances of the present case, no changes in the drawings or specifications having been made and only work required under the contract having been performed.

The provisions of Article 4 likewise appear to be inapplicable. In his appeal of November 4, 1942, the contractor states:

We think the contract contains ample provision for dealing with any reasonable contingency that may be encountered on the job. Article 4 deals with changed conditions, and an equitable adjustment to be made when such changed conditions are encountered. Surely it cannot be contended that the conditions encountered conformed to the conditions that reasonably might have been anticipated. The anticipated condition, and the condition contemplated by the Specifications, was that materials to be furnished by the Government would be available in such manner, as to enable the Contractor to meet the obligations imposed by the Specifications. When he arrived at the site, and it ultimately developed that this was not to be the case; then and in that event, the Contractor feels that conditions have materially changed, and that he is entitled to an equitable adjustment. In order to expedite the settlement of such an equitable adjustment, he tried to make his figure more than equitable so far as the Bureau of Reclamation was concerned.

The contractor cannot successfully contend that a delay in the delivery of timber piling is a "sub-surface and/or latent" condition, "materially differing from those shown on the drawings or indicated in the specifications," or an "unknown" condition "of an unusual nature differing materially from those ordinarily encountered and generally recognized as inhering in work of the character provided for in the plans and specifications." No material difference in "conditions" as contemplated by Article 4 was encountered by the contractor.

Pertinent to note is Article 5 of the contract, providing as follows:

Extras.—Except as otherwise herein provided, no charge for any extra work or material will be allowed *unless* the same has been *ordered in writing* by the contracting officer and the price stated in such order. [Italics supplied.]

Pertinent also to note is Article 9 of the contract. This article provides a definite procedure to be followed by the contractor in order to secure relief from the force and effect of the liquidated damage provision of the contract in the event delays should be encountered which in his judgment are attributable to causes excusable under the terms thereof. Had the delay in the delivery of the piles indicated the probability of a delay in the final completion date of the contract, the contractor could have invoked the provisions of this article as authority for requesting relief in the form of an extension of time, provided he gave the required notification to the contracting officer in writing of the causes of the delay "within 10 days from the beginning of any such delay." However, the contractor completed the work under the contract within the contract time, and no liquidated damages were assessed against him, and no request for an extension of time was received.

No showing has been made by the contractor that extra work was in fact performed on account of needs of the Government or for its benefit under which in proper circumstances he might have sought recovery of damages in the form of a change order under Article 3, modification of the contract as for a changed condition under Article 4, or an extension of time under Article 9. On the contrary, the record establishes conclusively that the contractor performed only the work originally required of him under the terms of the contract, and that he did so within the time limit set therein. The rule is well established that even in cases in which a contractor has in fact performed extra work under a contract with the Government, recovery therefor cannot be had unless such work was ordered in the manner prescribed by the contract. In *Plumley v. United States*, 226 U. S. 545, 547 (1913), the Supreme Court stated as follows:

The contract provided that changes increasing or diminishing the cost must be agreed on in writing by the contractor and the architect, with a statement of the price of the substituted material and work. Additional precautions were required if the cost exceeded \$500. In every instance it was necessary that the change should be approved by the Secretary. There was a total failure to comply with these provisions, and though it may be a hard case, since the court found that the work was in fact extra and of considerable value, yet Plumley cannot recover for that which, though extra, was not ordered by the officer and in the manner required by the contract. Rev. Stat., section 3744; *Hawkins v. United States*, 96 U. S. 689; *Ripley v. United States*, 223 U. S. 695; *United States v. McMullen*, 222 U. S. 460.

See also *Samford v. United States*, 78 Ct. Cl. 572, 576 (1933); *Griffiths v. United States*, 74 Ct. Cl. 245, 256 (1932); *G. & H. Heating Company v. United States*, 63 Ct. Cl. 164 (1927); *H. E. Crook Co. v. United States*, 270 U. S. 4 (1926).

II

Even aside from the foregoing, the form of the contractor's claim would preclude recovery by him in any event. The claim is based upon the contractor's estimate of loss sustained by reason of the delayed delivery of the piles, calculated after the completion of the work under the contract. It is in form an unliquidated claim for damages against the United States, not provided for by the terms of the contract, and not theretofore stipulated or agreed upon by the parties to the contract. *Armstrong v. Irwin*, 26 Ariz. 1, 221 Pac. 222 (1923), 32 A. L. R. 609. In *Wm. Cramp & Sons v. United States*, 216 U. S. 494, 500 (1910), the Supreme Court stated that "it is well understood that executive officers are not authorized to entertain and settle claims for unliquidated damages." The Court continued (quoting from *Power v. United States*, 18 Ct. Cl. 263, 275 (1883)), as follows:

Claims for unliquidated damages require for their settlement the application of the qualities of judgment and discretion. They are frequently, perhaps generally, sustained by extraneous proof, having no relation to the subjects of the contract, which are common to both parties; as, for instance, proof concerning the number of horses and the number of wagons and the length of time that would have been required in performing a given amount of transportation. * * *

As is well said by Judge Richardson, in the opinion already referred to [*McKee v. United States*, 12 Ct. Cl. 504, 556], this construction "would exclude claims for unliquidated damages, founded on neglect or breach of obligations or otherwise, * * *. And such has been the opinion of five Attorneys General—all who have officially advised the executive officers on the subject [citing opinions]. And the same views were expressed by this court in 1866 (*Carmick et al. v. United States*, 2 Ct. Cl. R. 126, 140)." *McClure v. United States*, 19 Id. 28-29; *Brannen v. United States*, 20 Id. 219, 223-224; 4 Opin. Attorneys General, 327-328; Id. 626, 630.

On October 17, 1937, Acting Comptroller General Elliott, in an analogous situation refused to certify a claim for payment, stating:

It is plain from what has been said that this may be considered only as an unliquidated claim for damages. The supervising engineer correctly informed you that such a claim could not be considered or paid administratively, as has been often decided. *Dunbar v. United States*, 19 Ct. Cls. 489, 493; *Brannen v. United States*, 20 id. 219; *State of Pennsylvania v. United States*, 36 id. 131, 135; also, see 33 Op. Atty. Gen. 354.

In the absence of specific statute this Office is without authority to certify such claims for payment from appropriated moneys. *Power v. United States*,

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18 Ct. Cls. 263, 275; *McClure v. United States*, 19 *id.* 173, 180; *Dennis v. United States*, 20 *id.* 119, 121, and 23 *id.* 324; 4 Op. Atty. Gen. 327; *id.* 627, 630; 14 *id.* 24; 15 *id.* 39. [17 Comp. Gen. 343, 345 (1937).]

See also 18 Comp. Gen. 261 (1938).

I therefore find as a fact that the contractor performed only the work required of him under the contract, that he did so within the time specified therein, and that he encountered no changed conditions within the meaning of Article 4 of the contract. Assuming that the contractor might establish damage as the result of the delay on the part of the Government in delivering the piles as anticipated, there is no relief which may be granted administratively for such damage. The findings of fact of the contracting officer accordingly are affirmed and the appeal is

Dismissed.

RIGHTS-OF-WAY ACROSS TRIBAL AND ALLOTTED INDIAN LANDS ON THE FLATHEAD RESERVATION, MONTANA

Opinion, January 27, 1943

INDIAN LANDS—TRIBAL LANDS—ALLOTTED LANDS—PUBLIC LANDS—REFORMATION OF PATENTS—FLATHEAD RESERVATION—RIGHTS-OF-WAY—DITCHES AND CANALS—ACT OF AUGUST 30, 1890 (26 Stat. 391, 43 U. S. C. sec. 945).

The provision in the act of August 30, 1890 (26 Stat. 391, 43 U. S. C. sec. 945), requiring that in all patents for lands taken up after that date under any of the land laws of the United States west of the 100th meridian there shall be a reservation of a right-of-way for ditches or canals constructed by the authority of the United States, has no application to the tribal lands on the Flathead Reservation.

The lands of Indian reservations established prior to August 30, 1890, were not subject to disposal under the land laws and were in no sense public lands.

The application of the 1890 act to lands to which the tribal title had attached prior to its passage would constitute a taking of private property by the United States and would render the Government liable to a claim for just compensation under the Constitution.

Legislation subsequent to 1890 by which Congress authorized the construction of ditches and canals across the tribal lands of the Flathead Reservation provides for the acquisition of the necessary rights-of-way and contains nothing to suggest that Congress intended the irrigation system on the Flathead Reservation to be constructed in disregard of Indian rights.

In any taking of the lands, either with the consent of the tribe or by condemnation, due consideration must be given, in the computation of the amount due the Indians, to any compensating benefits which the tribal lands will receive by reason of the irrigation system constructed thereon.

The act of August 30, 1890, *supra*, applies to all allotments carved out of the public domain. It also applies to allotments made and patented from lands of Indian reservations created out of the public domain by statute or Executive order subsequent to 1890.

Since lands which were in tribal status in 1890 were not subject to reserved public rights-of-way, it may not be assumed that they became subject to such rights-of-way by being allotted. Any language to the contrary included in a trust patent, being legally unauthorized, should be reformed or disregarded.

When rights-of-way are taken across Indian allotments, the allottee should receive the same compensation which would be due to the Indian tribe, in similar circumstances, if the land had never been allotted.

GARDNER, *Solicitor*:

You [Secretary of the Interior] have requested my opinion as to whether the Department may construct ditches and canals across the tribal lands of the Indians located on the Flathead Reservation, Montana, by reason of a provision contained in the act of August 30, 1890 (26 Stat. 391, 43 U. S. C. sec. 945). This provision in its code form reads:

In all patents for lands taken up after August 30, 1890, under any of the land laws of the United States or on entries or claims validated by the Act of August 30, 1890, west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described a right of way thereon for ditches or canals constructed by the authority of the United States.

A similar question is presented with respect to the allotted lands of the Flathead Indians.

I

I am of the opinion that the provision does not operate to reserve a right-of-way across the tribal lands of the Flathead Indians. Since the tribal lands of other Indians may be subject to particular treaties or statutes which might change the result, my opinion is limited to the Flathead Reservation.

The lands in question are part of the Flathead Reservation which was created by the treaty of July 16, 1855 (12 Stat. 975). By that treaty the Indians ceded certain lands to the United States and reserved for their exclusive use and benefit other lands, described in the treaty, which became the Flathead Indian Reservation. The lands over which it is now proposed to exercise a right-of-way for the construction of ditches and canals are those lands within the reservation which have not since been allotted to individual Indians or otherwise disposed of in accordance with the act of April 23, 1904 (33 Stat. 302), as amended.

The statutory provision, on its face, applies only to lands title to which is acquired from the United States after August 30, 1890.

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These lands were neither acquired from the United States nor were they acquired after 1890. Where lands are reserved to an Indian tribe from a cession made to the United States, as in this case, the Indians do not acquire title to the lands in the reservation through the treaty of cession but hold under their original title. *United States v. Romaine et al.*, 255 Fed. 253 (C. C. A. 9, 1919). The United States recognized the Indian title to these particular lands when it ratified the treaty of 1855, *supra*. No patents have ever been issued for the lands here in question nor can they be said to have been taken up under any of the land laws of the United States after August 30, 1890.

The legislative history of this provision shows conclusively that Congress did not intend to destroy vested rights, nor did it intend to include within the scope of the provision any lands other than the public lands of the United States.¹ Nowhere in the history of this provision is there any reference to Indian lands.

The provision appears in an act making appropriations for the sundry civil expenses of the Government for the fiscal year ending June 30, 1891. As reported to the House there was an item of \$720,000 appropriated for the purpose of investigating the extent to which the arid regions of the United States could be redeemed by irrigation, for the investigation of the sources of water to be used in irrigating, and the segregation of irrigable lands in such arid region, and for the selection of sites for reservoirs and other hydraulic works necessary for the storage and utilization of water for irrigation and for ascertaining the cost thereof, etc.² This item was in pursuance of the act of October 2, 1888 (25 Stat. 505, 526), which reserved from sale, entry, settlement or occupation all lands thereafter selected for sites for reservoirs, ditches or canals for irrigation purposes and all lands made susceptible of irrigation by such reservoirs, ditches or canals, provided, however, that the President might open any portion of the lands reserved to settlement under the homestead laws. Under the above act as then construed the arid lands in the country were tied up and withdrawn from public domain and no entry or settlement of them could be made until they were surveyed. Congress was called upon to repeal the law or make the necessary appropriation to permit the surveys to go ahead so that the land could be opened up to settlement.³ The bill passed the House with the appropriation for continuing such

¹ 21 Cong. Rec. 7929, 7930, 7931, 7933, 7984 (1890).

² *Id.*, 6045.

³ *Id.*, 6047, 6048, 6049, 6052, 6053.

surveys.⁴ The Senate Committee proposed to repeal the 1888 act. It was pointed out that that act as then construed⁵ not only deprived those who had made entry since then upon the public lands of their right to obtain title but also prevented all others from obtaining title and that it had absolutely stopped the settlement and development of the West. The proposal of the Committee was agreed to by the Senate,⁶ but the House refused to agree to the Senate amendment.⁷ The bill went to conference twice and the conferees finally suggested the language found in the statute. Thus it is necessary to consider this reservation of rights-of-way with the legislation to which it is attached, which is as follows:

For topographic surveys in various portions of the United States, three hundred and twenty-five thousand dollars, one-half of which sum shall be expended west of the one hundredth meridian; and so much of the act of October second, eighteen hundred and eighty-eight, * * * as provides for the withdrawal of the public lands from entry, occupation and settlement, is hereby repealed, and all entries made or claims initiated in good faith and valid but for said act, shall be recognized and may be perfected in the same manner as if said law had not been enacted, except that reservoir sites heretofore located or selected shall remain segregated and reserved from entry or settlement as provided by said act, until otherwise provided by law, and reservoir sites hereafter located or selected on public lands shall in like manner be reserved from the date of the location or selection thereof.

No person who shall after the passage of this act, enter upon any of the public lands with a view to occupation, entry or settlement under any of the land laws shall be permitted to acquire title to more than three hundred and twenty acres in the aggregate, under all of said laws, but this limitation shall not operate to curtail the right of any person who has heretofore made entry or settlement on the public lands, or whose occupation, entry or settlement, is validated by this act: *Provided*, That in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right-of-way thereon for ditches or canals constructed by the authority of the United States.

It is to be observed that this entire legislation, including the proviso under consideration, is concerned with the occupation, entry or settlement of public lands. By virtue of the proviso, a perpetual easement

⁴ *Id.*, 6059.

⁵ The Commissioner of the General Land Office stated, in a letter read into the record (p. 7276), that in view of the above act the General Land Office could not approve or suffer to go to patent any entries of land that may be found within the general terms of the statute. The Commissioner pointed out that the reservation did not depend upon the designation of the lands by the Geological Survey but that it was within the terms of the statute itself. By circular dated August 5, 1889, the district land offices were instructed that they should cancel all filings made since October 2, 1888, and should thereafter receive no filings upon any of such lands.

⁶ *Id.*, 7415.

⁷ *Id.*, 7818.

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and right-of-way for ditches and canals constructed by authority of the United States over all public lands west of the one hundredth meridian entered and patented subsequent to the passage of the act were created. *Green v. Wilhite*, 14 Idaho 238, 93 Pac. 971 (1908). Recitation of the reservation in patents issued for the lands appraised the patentees of the reserved rights of the United States. *Ide v. United States*, 263 U. S. 497, 503 (1924). Lands severed from the public domain or otherwise disposed of prior to the date of the enactment plainly were not within its contemplation. This is recognized by the proviso itself which directs that the reservation of the right-of-way be expressed only in patents for lands thereafter taken up under any of the land laws of the United States. The lands of Indian reservations established prior to the date of the enactment were not subject to disposal under the land laws and were in no sense public lands. *United States v. Minnesota*, 270 U. S. 181, 206 (1926); *Leavenworth, Lawrence & Galveston R. R. Co. v. United States*, 92 U. S. 733, 745 (1875); *United States et al. v. McIntire et al.*, 101 F. (2d) 650, 654 (C. C. A. 9, 1939). A holding that such lands are subject to the right-of-way reservation of the 1890 act would find no support in the legislative history of the enactment and would contradict the plain and unambiguous language of the statute.

It has been urged that this Department has over a long period of years given the statute a contrary interpretation. I find no decision, departmental or judicial, that goes so far as to hold that lands which were in Indian tribal ownership at the time of enactment of the act of 1890 and which still belong to the tribe are subject to the right-of-way reservation in question.

In the case of *United States v. Van Horn*, 197 Fed. 611 (D. Colo. 1912), the court was dealing with lands which were subject to disposition under the public land laws in 1890 and not, as in the present case, with lands which have never been public lands and to which the public land laws were not in 1890 and are not now applicable.

None of the departmental decisions to which my attention has been called deals with the application of the act of 1890 to tribal lands of Indian reservations validly established prior to that date. The case of *Clement Ironshields*, 40 L. D. 28 (1911), held that the right-of-way reservation should be inserted in a patent to be issued to the purchaser of an Indian allotment. Two Solicitor's opinions, one dated July 10, 1931 (53 I. D. 399), and one dated August 25, 1938 (M. 29908), deal with the payment of compensation for damages done to individually owned land provided for by the act of February 20, 1929 (45 Stat. 1252). Both recognize, without discussion of the point, the existence of a right-of-way across the land under the act of 1890. Apparently

the Department has uniformly and consistently interpreted the act of 1890 as reserving to the United States a right-of-way for ditches and canals over Indian allotments patented to individual Indians and their successors in interest after that date. The reservation of such a right-of-way has apparently been expressed in all such patents issued for lands located west of the one hundredth meridian. The Department so directed by order of September 3, 1908, as amended November 18, 1908. Neither that order nor the correspondence leading up to its issuance contains any intimation or claim that tribal lands of reservations created prior to 1890 were impressed with the right-of-way reservation. My conclusion that no such reservation exists with respect to the tribal lands of such a preexisting reservation is not, therefore, in conflict with any departmental order or ruling on the subject. On the contrary, the Department has held in an analogous situation that a right-of-way for ditches and canals was not reserved to the United States by the 1890 act. In an opinion approved February 2, 1935, M. 27871, the Solicitor considered the question of whether certain lands in the primary lists and limits of the grant of July 1, 1862 (12 Stat. 489), as amended July 2, 1864 (13 Stat. 356), to the Central Pacific Railroad Company and patented to the company on September 6, 1896, under said grant without reservation of rights-of-way under the 1890 act may be taken under the authority of such proviso or whether the lands must be acquired by purchase. After pointing out that the map of definite location, the official plat of survey, and the lists were all filed prior to August 30, 1890, and that the title of the railroad had fully vested prior to that date and after referring to the instructions of the Department issued on April 19, 1912 (42 L. D. 396), to the effect that where title vested prior to August 30, 1890, the reservation clause should not be inserted in patents issued, the Solicitor concluded that the land required must be purchased and could not be taken under the proviso of the 1890 act.

In my opinion this is the correct analysis of the law. The principle announced therein that the reservation of a right-of-way was not effective where title had vested prior to August 30, 1890, is equally applicable to the tribal lands on the Flathead Reservation. Therefore, my answer to the question propounded is that the Department may not construct ditches and canals across the tribal lands of the Flathead Indians by reason of the reservation contained in the act of August 30, 1890, *supra*. Indeed, the application of that act to lands to which the tribal title had attached prior to its passage would, on principles stated and applied in *United States v. Klamath and Moadoc Tribes of Indians*, 304 U. S. 119 (1938), and *Shoshone Tribe v. United*

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States, 299 U. S. 476 (1937), constitute a taking of private property by the United States and would render the Government liable to a claim for just compensation under the Constitution.

It has been suggested that by legislation subsequent to 1890, Congress has authorized the construction of ditches and canals across the tribal lands of the Flatheads and that since Congress made no provision for the purchase or acquisition of rights-of-way it must have acquiesced in the Department's interpretation of the 1890 act. As stated above I know of no departmental decision which may be said to hold that the tribal lands of the Flathead Indians are subject to the right-of-way imposed by the 1890 act. Nor do I find support for this suggestion in the subsequent legislation of Congress. That legislation, contrary to the suggestion of the Office of Indian Affairs, does make provision for the acquisition of the necessary rights-of-way,⁸ and contains nothing to suggest that Congress intended the irrigation system on the Flathead Reservation to be constructed in disregard of Indian rights. It must be assumed that when Congress authorized the Secretary of the Interior to perform any and all acts necessary and proper for the purpose of carrying out the provisions of the 1904 act as amended⁹ and when it appropriated money for the purchase of necessary rights of property, Congress intended that the plan for the irrigation of the lands on the reservation would be carried out in a legal manner, and that when it was necessary to take lands over which no right-of-way had been reserved these lands would be taken in the manner prescribed by law and that just compensation would be paid to the Indians for the lands taken.

In any taking of the lands, either with the consent of the tribe or by condemnation, due consideration must be given, in the computation of the amount due the Indians, to any compensating benefits which the tribal lands will receive by reason of the irrigation system constructed thereon. *Bauman v. Ross*, 167 U. S. 548 (1897); *United States v. River Rouge Improvement Co. et al.*, 269 U. S. 411 (1926); *Aaronson et al. v. United States*, 79 F. (2d) 139 (App. D. C. 1935); *United States v. Victor N. Miller et al.*, 317 U. S. 369.

⁸ The acts of January 24, 1923 (42 Stat. 1192), June 5, 1924 (43 Stat. 402), March 3, 1925 (43 Stat. 1153), and May 10, 1926 (44 Stat. 464), appropriating money for the construction of irrigation systems on the Flathead Reservation provided that the money appropriated should be used for the purpose of purchasing "any necessary rights of property."

⁹ Section 15 of the act of May 29, 1908 (35 Stat. 444, 450), authorized the Secretary of the Interior to perform any and all acts necessary and proper for the purpose of carrying into full force and effect the act of April 23, 1904 (33 Stat. 302), section 14 of which provided that a certain part of the proceeds from the sale of lands on the reservation to be opened to settlement should be used for the construction of irrigating ditches for the benefit of the Indians.

II

As to the application of the act of 1890 to lands allotted in severalty to individual Indians, the act clearly applies to all such allotments carved out of the public domain¹⁰ and likewise to allotments made and patented from land of Indian reservations created out of the public domain by statute or Executive order subsequent to 1890. Whether it applies to allotments of land which belonged to Indian tribes in 1890 or prior to that date presents a more serious problem. The considerations above noted governing the interpretation of the 1890 statute all indicate that the statute was not intended to apply, and should not apply, to lands which, when it was passed, were Indian lands rather than public lands. On the other hand, the Department has given the statute a contrary interpretation with respect to allotments over a period of nearly half a century and has regularly included in Indian trust patents express reservations for rights-of-way pursuant to the language of the 1890 statute. This course of practical construction would probably be upheld if challenged in the courts.¹¹

The problem that is now presented cannot be satisfactorily disposed of without some recognition of changes that have taken place over recent decades in the administrative attitude to Indian property. Undoubtedly there was a time when Indian lands were considered by administrative authorities as public lands, for most purposes. Indians were deemed to occupy such lands by sufferance, and without legal rights,¹² and all incidents of ownership were considered to be vested in the Federal Government. Under this theory of tribal property,¹³ tribal land was, in substance, considered as public land and a "trust patent" transforming tribal land into an individual allotment was viewed as an instrument conferring rights of private property in the public domain where no such rights had existed before. Under this view, and so long as this view had any vitality, it was deemed to be proper to make "trust patents" subject to those reserved public rights which, according to the 1890 statute, were to be specified in patents conferring rights of private property in portions of the public domain.

¹⁰ Section 15 of act of March 3, 1875 (18 Stat. 420, 43 U. S. C. sec. 189) ; section 1 of act of July 4, 1884 (23 Stat. 96, 43 U. S. C. sec. 190) ; section 4 of the act of February 8, 1887 (24 Stat. 389, 25 U. S. C. sec. 334).

¹¹ *Estate of Sanford v. Commissioner of Internal Revenue*, 308 U. S. 39, 52 (1939) ; *United States v. Jackson et al.*, 280 U. S. 183, 193 (1930) ; *Kern River Co. et al. v. United States*, 257 U. S. 147 (1921).

¹² 8 Op. Atty. Gen. 255 (1856).

¹³ The theory that Indian lands are simply lands on which Indians are permitted to live and are protected from interference at private hands but in which they have no property rights is described in Cohen, *Handbook of Federal Indian Law*, at p. 288, as the "menagerie theory."

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While this view of Indian tribal lands was never confirmed by Congress¹⁴ or by the courts,¹⁵ it was, for several decades, applied often enough to be considered a common view of the matter in Executive circles. The first clear expression of this view is perhaps to be found in an opinion of Attorney General Cushing, rendered in 1856, advising the Secretary of the Interior that the recognition of Indian proprietary rights by treaty was "an error" and that such alleged rights could not impair grants of land by the United States to third parties (8 Op. Atty. Gen. 255). Sporadically, though not consistently, administrative action was taken which could be justified only on the theory that Indian occupancy was purely a matter of grace and subject to termination at will without cause or compensation. In recent years the United States has paid several million dollars to Indian tribes which suffered from the application of this view.¹⁶ The first clear rejection of this administrative view is to

¹⁴ See *Leavenworth etc. R. R. Co. v. United States*, 92 U. S. 733 (1875), where the Court said: " * * * the policy which dictated them [railroad land grants] confined them to land which Congress could rightfully bestow * * *. For all practical purposes, they [the Indians] owned it; * * * The United States has frequently bought the Indian title, to make room for civilized men,—the pioneers of the wilderness; but it has never engaged in advance to do so, nor was constraint, in theory at least, placed upon the Indians to bring about their acts of cession." (At pp. 742-743.) While Congress did, on various occasions, dispose of Indian property for non-Indian purposes without Indian consent, this apparently happened only when the facts and applicable law had not been adequately presented. See comment of the Supreme Court in *United States v. Mille Lac Chippewas*, 229 U. S. 498 (1913), on Joint Resolutions of July 22, 1890, 26 Stat. 290, and May 27, 1898, 30 Stat. 745, in *Jones v. Meehan*, 175 U. S. 1 (1899), on the Joint Resolution of August 4, 1894, 28 Stat. 1018, and in *Choate v. Trapp*, 224 U. S. 665 (1912), on the Act of May 27, 1908, 35 Stat. 312. All these enactments were held unconstitutional in whole or in part.

On the other hand, Congress, even in the period when recognition of Indian property rights was at its lowest ebb, regularly affirmed the sanctity of such rights, even where based only on aboriginal occupancy. See, for example, Act of May 17, 1884, 23 Stat. 24 (protecting Indian possession in Alaska); Act of March 3, 1891, 26 Stat. 854 (protecting "any just and unextinguished Indian title or right to any land or place" against private land claims in former Mexican territory); and see Cohen, *Handbook of Federal Indian Law*, 308, and authorities cited.

¹⁵ See cases cited in preceding footnote.

¹⁶ In the years following 1864, the Interior Department disposed of certain Chippewa lands as public lands, and this was later characterized as illegal by the Supreme Court. *United States v. Mille Lac Chippewas*, 229 U. S. 498 (1913).

In 1871 the Interior Department improperly patented to the State of Minnesota certain lands belonging to certain bands of Chippewa Indians, and a cancellation of the patent was subsequently decreed. *United States v. Minnesota*, 270 U. S. 181 (1926).

In 1878 the Office of Indian Affairs improperly opened the Shoshone Reservation in Wyoming to the Arapahoe Indians, an act for which the Supreme Court later allowed damages in the sum of \$4,408,444.23 with interest. *United States v. Shoshone Tribe*, 304 U. S. 111 (1938).

From 1898 to 1927, the Secretary of the Interior expended Creek funds without Indian consent, and the United States was held liable therefor in the sum of \$110,644.92 with interest. *Creek Nation v. United States*, 78 Ct. Cl. 474 (1933).

In 1906, the Secretary of the Interior disposed of a portion of the Klamath Reservation without the consent of the Indians, an act for which the Supreme Court allowed damages in the sum of \$5,313,347.32 with interest. *United States v. Klamath Indians*, 304 U. S. 119 (1938).

be found in the opinion of Attorney General Stone in 1924, advising Secretary of the Interior Fall that the proposed disposition, under the public land mineral laws, of lands within Executive order Indian reservations would constitute a violation of the proprietary rights of the Indians (34 Op. Atty. Gen. 181). The period of executive disregard of Indian property rights may perhaps be more definitely fixed in terms of the practice of diminishing Executive order Indian reservations and restoring such lands to the public domain by unilateral Executive order without affording compensation to the Indians. The first known instance of this practice apparently occurred in 1871,¹⁷ the last in 1921.¹⁸ During this period approximately 82 reductions of Indian reservations were thus effected. The validity of this form of action was questioned in 1924 in the opinion of Attorney General Stone already cited, and Congress forbade the practice in 1927.¹⁹

In the act of June 18, 1934 (48 Stat. 984), Congress provided that Indian lands should not be disposed of over the objection of the Indians concerned, thereby recognizing, if not creating, enforceable tribal property rights in such lands.²⁰ The provisions of this act are applicable to the Flathead Reservation, among others.

In 1938 the Supreme Court of the United States, in the case of *United States v. Shoshone Indians*, *supra*,²¹ dealt the death blow to the theory that tribal lands are public lands of the United States.

¹⁷ The reasons for this practice are thus set forth in the justification submitted by Commissioner of Indian Affairs E. S. Parker (himself an Indian) and approved by President Grant:

"It appears from the papers transmitted herewith that the citizens of San Diego County protest against the order of the President setting apart said lands for Indian reservations; that the Indians are unanimously opposed to going on said reservations; that citizens have made valuable improvements thereon, and that there are but few Indians on the lands set apart as aforesaid; that recent gold discoveries have attracted a large immigration thither, and the opinion of the press, together with other evidence, would indicate that it would be for the best interests and welfare of the Indians, as well as others, that the order of the President setting apart said lands for Indian purposes should be rescinded." [*Executive Orders Relating to Indian Reservations: From May 14, 1855 to July 1, 1912*, Department of the Interior, 1914, pp. 43-45.]

¹⁸ *Executive Orders Relating to Indian Reservations: From July 1, 1912 to July 1, 1922*, Department of the Interior, Vol. II, p. 27.

¹⁹ Act of March 3, 1927, sec. 4 (44 Stat. 1347).

²⁰ Section 1(d) of Article VI of the Flathead Constitution approved October 28, 1935, vests in the Tribal Council power to approve or veto any use or disposition of tribal property, and section 7 of the corporate charter, ratified April 25, 1936, expressly recognizes the tribal ownership of unallotted lands.

²¹ For many years prior to the decision in that case the Interior Department and the Department of Justice, relying upon language of the Supreme Court in *United States v. Cook*, 19 Wall. 591 (1873), had taken the view that the timber on Indian tribal land belonged to the United States and that the Indians, by virtue of a "right of occupancy," were entitled to no greater rights than those vested in a tenant for life. In accordance with this view, the Attorney General, in 1888, advised the Secretary of the Interior that Indians had no right to cut and sell timber on an Indian reservation (19 Op. Atty. Gen. 194), and two years later the Attorney General advised that the proceeds of timber

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In view of these considerations, it would, in my judgment, be unfair and anachronistic to continue to treat Indian tribal lands as if they were part of the public domain and to treat Indian trust patents as instruments for disposing of the public domain. Rather we must recognize that tribal land is land which, in equity if not in strict law, belongs to Indian tribes. The process of allotment was not intended to reduce the value of the land allotted. The opposite was the case.²² Since, then, lands which were in tribal status in 1890 were not subject to reserved public rights-of-way, we are not to assume now that they became subject to such rights-of-way by being allotted. Any language to the contrary included in a trust patent, being legally unauthorized, should be reformed or disregarded.²³

I am satisfied that no other view is consistent with the authorities now on the books. But I should be reluctant to say that an opposite view was not reasonable when it was first laid down. Rather all the evidence indicates that in 1890 and for some years thereafter administrative authorities acted in all good faith when they treated Indian tribal lands as a species of public lands of the United States, denying any claim of Indian proprietary right.

The question before us may then be put in these terms: Did Congress, in passing a law relating to "public lands" in 1890, at a time when the Interior Department erroneously but honestly viewed tribal lands as public lands, thereby preclude the Department from rising above its original error? I think it would be unreasonable to impute to Congress so obscurantist an attitude towards the possibility of progress in administrative wisdom. Congress undoubtedly contemplated that the proper administrative authorities would decide from time to time what lands were "public," that in the course of time views on this, as on most other questions, might change, and that such changes in viewpoint would normally be followed by changes in practice. Now that the Department of the Interior has abandoned the view that tribal lands are public lands of the United States, it would seem reasonable to abandon the practice

illegally cut upon such lands belonged not to the Indians but "to the Government absolutely." (19 Op. Atty. Gen. 710.) In repudiating the interpretations placed upon its earlier decision and opinion, the Supreme Court in the *Shoshone* case held that the timber on tribal land belonged to the Indians as did the minerals and every other element of value appurtenant to the land, and that, under appropriate jurisdictional legislation, the United States was liable to the Indians for the value of that which it had taken from them. "For all practical purposes," the Court said, "the tribe owned the land * * *. The right of perpetual and exclusive occupancy of the land is not less valuable than full title in fee." [p. 116]

²² See Cohen, *Handbook of Federal Indian Law*, ch. 11.

²³ *Francis v. Francis*, 203 U. S. 233 (1906); *Hemmer v. United States*, 204 Fed. 898 (C. C. A. 8, 1912); *United States v. Saunders*, 96 Fed. 268 (C. C. Wash. 1899). Cf. *Leedy v. United States*, 190 Fed. 289 (C. C. A. 8, 1911).

of taking Indian lands for rights-of-way without paying compensation, which was based upon that abandoned view.

This, however, does not imply that actions taken in past years upon the basis of an abandoned theory are now to be considered redressible wrongs. At no time was the past administrative interpretation of this statute so unreasonable that a court could be induced to give relief against its consequences.²⁴ All that this opinion implies is that there is a realm of administrative discretion within which courts will not interfere, and within which administrative authorities may modify views which turn out to be unwise without thereby raising a host of *ex post facto* claims against the Government.

The fiction that interpretation of laws reveals their eternal meaning has long stood in the way of any such distinction between the prospective and the retrospective application of decisions. But in recent years a more realistic view of the matter has achieved respectability. The Supreme Court has made it clear that nothing in the Federal Constitution or in the nature of the legal process prevents a tribunal from recognizing changing circumstances and laying down a rule for the future different from the rule which it has sustained for the past. Thus the Supreme Court has upheld the validity of a State court decision which lays down for the future a rule different from that applied in the past.²⁵ The Supreme Court itself has, on occasion, laid down a new rule of law for the future while recognizing the propriety of a different rule in the past.²⁶ The Supreme Court has likewise recognized the propriety of an administrative decision which lays down a new rule for the future without detracting from the validity of a different rule applied in the past.²⁷

Since *Gelpcke v. City of Dubuque*, 1 Wall. 175 (1863), State tribunals have commonly denied a retroactive effect to decisions over-

²⁴ Cf. opinion of Supreme Court in *Sioux Tribe v. United States*, 316 U. S. 317 (1942), holding that the revocation in 1879 of Executive order additions to the Greater Sioux Reservation did not ground a claim for damages against the United States under the jurisdictional act of June 3, 1920 (41 Stat. 738). Notwithstanding the present policy of according Executive order reservations the same respect and protection due other reservations, the Court points out that a different policy prevailed in 1879 and deals with the question of redress in terms of the then prevailing policy.

²⁵ *Great Northern Railway v. Sunburst Co.*, 287 U. S. 358 (1932).

²⁶ *Montgomery Ward & Co. v. Duncan*, 311 U. S. 243 (1940); *Reconstruction Finance Corp. v. Prudence Securities Advisory Group*, 311 U. S. 579 (1941).

²⁷ *American Chicle Co. v. United States*, 316 U. S. 450 (1942). In that case the court declared: " * * * the petitioner insists that the antecedent administrative interpretation long in force renders it impossible for the Commissioner to promulgate a regulation changing for the future the earlier practice, even though the new regulation comports with the plain meaning of the statute. We think the contention cannot be sustained (citing cases)." [At p. 455.] It must be noted, however, that in this case, as in the cases cited, power to modify regulations without retroactive effect was conferred by the governing statute.

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ruling past decisions, where the public convenience would be served by such a distinction.²⁸ A similar attitude has been taken, on occasion, by this Department.²⁹ The application of such a distinction to the circumstances now before me seems amply warranted. Without, then, expressing any disapproval of the rule thus far followed by this Department, and recognizing, on the contrary, that the past applications of this rule do not constitute redressible injuries, I must advise that for the future, when rights-of-way are taken across Indian allotments, the allottee³⁰ should receive the same compensation which would be due to the Indian tribe, in similar circumstances, if the land had never been allotted.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

REGULATION OF HUNTING AND FISHING ON WIND RIVER RESERVATION IN WYOMING

Opinion, February 12, 1943

HUNTING AND FISHING—RESERVATION LAND—CEDED LAND—AUTHORITY OF TRIBAL
COUNCIL—STATE AUTHORITY—APPLICABILITY OF 25 U. S. C. SEC. 216.

The tribal councils may regulate hunting and fishing on the diminished portion of the reservation by Indians as well as non-Indians, and in particular they may regulate fishing on Bull and Ray Lakes on the diminished portion of the reservation.

The State may regulate hunting and fishing on the ceded portion of the reservation, including fishing in Ocean Lake, except that the tribal councils may regulate hunting and fishing on such areas thereof as may be restored to tribal ownership pursuant to the provisions of the Shoshone Judgment Act (53 Stat. 1128, 25 U. S. C. secs. 571-577).

The requirement of State licenses to hunt or fish on the ceded portion of the reservation may not, however, be made a means of raising revenue.

Section 216, 25 U. S. C., is applicable to the restored lands but it may be invoked only against non-Indians who hunt upon the lands without a license.

GARDNER, *Solicitor.*

You [Secretary of the Interior] have submitted to me a number of questions relating to the regulation of hunting and fishing on

²⁸ See Note 29 Harv. L. Rev. 80 (1915); and Note 42 Yale L. J. 779 (1933).

²⁹ 38 L. D. 553.

³⁰ No opinion is here intimated as to the rights of non-Indian assigns who have purchased with notice of the reservation of rights-of-way and presumably taken account of the reservation in fixing the purchase price.

the Wind River Reservation in Wyoming. These questions have arisen as a result of the adoption by the Shoshone and Arapahoe Tribal Councils of regulations governing fishing on Bull Lake and Ray Lake, which are both within the diminished portion of the reservation, as well as on Ocean Lake, which is on the ceded portion of the reservation. These tribal regulations, apart from the measures of conservation which they embody, provide for the issuance of free permits to the enrolled members of the tribes and their immediate families but require all other persons to pay for tribal permits in addition to securing proper State licenses.

Following the adoption of these regulations, the Wyoming Game and Fish Commission requested this Department "to clarify and determine the exact status" of that Commission "with reference to the control of all the wild life and fish on what is known as the ceded portion of the Shoshone Reservation." The Commission states that it has, for a number of years, protected and restored a number of game species on the ceded portion of the reservation, but that, as the result of the recent purchases by the Shoshone Indians of certain tracts of land within that area with tribal funds made available for the purpose by the act of July 27, 1939, known as the Shoshone Judgment Act (53 Stat. 1128, 25 U. S. C. secs. 571-577), confusion exists as to where jurisdiction lies to control hunting and fishing therein. While the Commission's request is limited to the status of the ceded portion of the reservation, its orders have nevertheless contained regulations governing fishing on Bull Lake and Ray Lake which are within the diminished portion of the reservation.

After the reservation area, as established by the treaty of July 3, 1868 (15 Stat. 673), had been diminished by the act of March 3, 1905 (33 Stat. 1016), the Wyoming Game and Fish Commission appears also to have assumed full control over big game on the ceded lands. I am informed that during this whole period the entire area has been officially closed under State regulations except that open seasons were authorized in 1935-36. I am also informed that little hunting was done by Indians on the ceded lands until 1939. Since then, however, there has been a slight increase in Indian hunting activity.

1. I shall first deal with the simpler questions, which are whether the tribal councils have authority to regulate hunting and fishing on the diminished portion of the reservation. I need say little to demonstrate the validity of the general proposition that Indians may hunt and fish on their reservations without conforming to State conservation laws. Insofar as the Indians are concerned State jurisdiction is excluded. It has been so decided by State as well as

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Federal courts. *State v. Cooney*, 80 N. W. 696 (Minn.); *Cohen v. Gould*, 225 N. W. 435 (Minn.); *State v. Cloud*, 228 N. W. 611 (Minn.); *State v. Johnson*, 249 N. W. 284 (Wis.); *Pioneer Packing Co. v. Winslow*, 294 Pac. 557 (Wash.); *United States v. Sturgeon*, Fed. Cas. 16413, 6 Sawy. 29 (D. C. D. Nev.); *In re Blackbird*, 109 Fed. 139 (D. C. W. D. Wis.); *In re Lincoln*, 129 Fed. 247 (D. C. N. D. Calif.); *United States ex rel. Lynn v. Hamilton*, 233 Fed. 685 (D. C. W. D. N. Y.). Indeed it has been said that the power of the State to apply its conservation laws to Indians on an Indian reservation is excluded by the mere fact that it is a reservation validly created under Federal authority. The treaty of July 3, 1868, which created the Wind River Reservation, contained no express recognition of hunting or fishing rights, but no such provision is necessary. The Indians retain such rights by the very nature of the grant. Such was the implication in *United States v. Winans*, 198 U. S. 371, 381, where the Supreme Court commented that the right of the Indians to fish was "not much less necessary to the existence of the Indians than the atmosphere they breathed."

However, in all the reported cases the precise question involved has been the power of the State to punish Indians for hunting or fishing on their reservations, while the question now also presented to me is the power of the Indian tribes to regulate hunting and fishing on the reservation by non-Indians. However, this power too would seem to be undoubted. It is only an exercise of the well-established right of tribal sovereignty, as well as an exercise of the power of dominion which any owner has over his property. As the court pointed out in *United States v. Sturgeon*, *supra*: "It is plain that nothing of value to the Indians will be left of their reservation if all the whites who chose may resort there to fish." The court therefore held that white men who go upon the reservation to fish do so "contrary to law." An Indian tribe has also an inherent power to exclude trespassers upon its lands (*Buster v. Wright*, 135 Fed. 947 (C. C. A. 8, 1905); 1 Op. Atty. Gen. 465, 17 Op. Atty. Gen. 134, 18 Op. Atty. Gen. 34), as well as power to exclude nonmembers from the reservation, and by virtue of this power it may impose license fees for the privilege of entering its domain, or remaining thereon. The tribal councils may therefore require that nonmembers of the tribe, including resident landowners, shall secure reservation fishing permits and observe conservation rules.

The penalties imposed for violation of the fishing regulations are the forfeiture of the permit, and the confiscation of the fishing equipment in the possession of the violator at the time of his detection. The violator is also declared to be "subject to prosecution

for trespass on Indian lands." The provision for forfeiture and confiscation is valid. *James H. Hamilton v. United States*, 42 Ct. Cl. 282. The threat of prosecution for trespass must, however, be regarded as partly vain. There is no State statute, nor any general Federal statute authorizing criminal prosecution for trespass on Indian lands. 25 U. S. C. sec. 216 imposes a penalty only for unlawful hunting on Indian lands.

2. It remains to be considered whether there are any special circumstances affecting the rights of the tribal councils to regulate fishing in the waters of Bull and Ray Lakes. I am informed that Bull Lake was originally a natural lake entirely on tribal lands, but it has been somewhat modified through the construction of a dam at its lower end by the Bureau of Reclamation pursuant to the act of March 14, 1940 (54 Stat. 49). This act, however, only granted easements to the United States over tribal and allotted lands of the Wind River Reservation for a dam site and reservoir purposes in connection with the development of the Riverton Reclamation project. Not only did this act not extinguish the Indian title, but section 3 thereof expressly provided: "The easements herein granted shall not interfere with the use by the Indians of the Wind River or Shoshone Indian Reservation of the lands herein dealt with and the waters of Bull Lake Creek and the reservoir insofar as the use by the Indians shall not be inconsistent with the use of said lands for reservoir purposes." This express reservation of existing rights confirms the conclusion that Indian control of the lake for fishing purposes was not affected in any way. I am not informed, and I have no reason to suppose that fishing activities will be "inconsistent with the use of said lands for reservoir purposes." At most only the lower end of the lake has been modified by the Reclamation project.

3. I proceed to consider the special status of Ray Lake, which should more properly be called Ray Lake Reservoir, since it is a wholly artificial rather than a natural lake. Constructed by the Indian Irrigation Service as an Indian irrigation project, it is now part of the Wind River Irrigation project, and irrigates non-Indian as well as Indian lands. Although not a natural lake, a depression existed once at the site of the present Ray Lake Reservoir forming pot holes which collected some water after the spring runoffs or heavy storms but these shallow pools would soon dry up and never contained any fish. Some time between 1910 and 1913 there was built at the site of the present dam a small dike, together with a lateral from the Ray main canal, to supply water to the site. Enlargement of this small original development was authorized in 1923.

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and the work was completed in 1925. The Interior Department Appropriation Act, 1923 (act of May 24, 1922, 42 Stat. 552, 580), appropriated \$10,000 for the acquisition of the necessary lands or rights-of-way. The present Ray Lake Reservoir, which is entirely within the reservation, covers an area of approximately 500 acres when filled but the whole project embraces an area of about 700 acres. Of these, 380 acres were unallotted tribal lands withdrawn as a reservoir reserve by departmental action on April 7, 1921; 21.4 acres, acquired with the funds appropriated, consisted of two parcels of fee-patented land in non-Indian ownership; the remaining acres were Indian trust allotments similarly acquired from their Indian owners. The whole project includes not only the lake or reservoir bed but the dam and spillway, and there is a variable border around the lake that is above the high water elevation. The dam and control works are located on one of the fee-patented tracts. Other parts of the fee-patented lands are above the freeboard line of the reservoir at high water, and also do not therefore form part of the bed of Ray Lake Reservoir.

Since Ray Lake was not in existence when the reservation was created, the tribe can hardly assert an implied right of an aboriginal character to fish in its waters. It is also true that the United States has acquired title to a portion of the bed of the lake by purchasing the Indian trust allotments, and the two small parcels of fee-patented land, a few acres of which may form part of the bed of the lake although this is not entirely clear from the submitted facts. Nevertheless, it is apparent from what was done that it must have been the intention to dedicate all the lands constituting the Ray Lake Reservoir project to Indian use, and thus to restore them to reservation status.¹

Ray Lake lies wholly within the exterior boundaries of the diminished portion of the reservation. The reason that a State may not apply its conservation laws to Indians on Indian reservations validly created under Federal authority is that the creation of such a reservation is the plainest and most unmistakable manifestation of the exclusive guardianship of the Federal Government over the Indians. It cannot therefore be readily assumed that the Federal Government by undertaking irrigation work upon the reservation intended either to enlarge State jurisdiction in any way, or to interfere with the normal exercise of tribal sovereignty. After all, Ray Lake was constructed as an Indian irrigation project within the

¹ That an Indian reservation is merely land set apart for tribal use and occupancy, and that no particular formalities need be observed in making such a disposition, see the discussion, *infra*, in connection with the ceded lands.

exterior boundaries of the reservation. In making the appropriation for the project, Congress manifested no intention to interfere with the jurisdictional *status quo*. So far as concerns the tribal land, the intention could not have been more than to acquire a flowage easement. When the tribe was deprived of the agricultural use of these lands, it must have been intended to confer upon it the only use to which the lands might thereafter be put, and the new use was to be deemed a substitute for the old. As for the lands formerly in private ownership, the correspondence relating to their acquisition shows that when the project was first being considered the intention was simply to acquire a right-of-way over these lands, and the titles were acquired only because they would have had no other value. The fact that these lands were almost entirely Indian lands over which the State had never acquired jurisdiction makes it easier to assume that all of them were to be devoted to Indian use. In the case of Bull Lake, the modification of which was authorized many years later, Congress did, it is true, expressly provide that the rights of the Indians should not be affected² but this provision can most properly be deemed to have been made only out of an abundance of caution.

This conclusion is not invalidated by the fact that the lands abutting upon the lake bed are for the most part in non-Indian private ownership. Since Ray Lake is not a natural but an artificial lake, and the title to the bed of the lake is not in the State, the abutting non-Indian proprietors cannot assert a right to fish in the lake waters.³ It may be that such proprietors can prevent access to the lake by others but this neither enlarges the right of the State to regulate nor diminishes the right of the tribes. Whoever does choose to fish in the lake, whether an abutting proprietor, a non-Indian outsider, or a member of the tribes, must abide by the regulations adopted by the tribal councils.

4. There remains to be considered the more difficult question of the asserted rights of the tribal councils to regulate hunting and fishing on the ceded lands.

a. At the time of the admission of the State of Wyoming into the Union the lands comprising what have come to be known as the "diminished" and "ceded" portions of the Shoshone or Wind River Reservation were held by the Indians with all the rights which use and occupancy could give. By the treaty of July 2, 1863 (18 Stat. 685), the United States expressly recognized the rights of the Sho-

² Section 3 of the act of March 14, 1940, *supra*.

³ As indicated above, the United States acquired by purchase all of the lands constituting the bed of Ray Lake except the unallotted tribal lands.

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shone to these lands. By the treaty of July 3, 1868 (15 Stat. 673), however; it was agreed between the Shoshone Indians and the United States that only the "district of country" definitely described therein, which included both the "diminished" and "ceded" portions of the present reservation, should be set apart for the absolute and undisturbed use and occupation of the Indians, and that the Indians would make this reservation their permanent home. But again on March 3, 1905, after the admission of the State of Wyoming into the Union, Congress ratified the agreement with the Indians by which they ceded a portion of their lands to the United States for disposition in the manner specified therein (33 Stat. 1016). There can be no doubt that a trust was thereby impressed upon the ceded lands, for the agreement expressly provided that "the United States shall act as trustee for said Indians to dispose of said lands and to expend for said Indians and pay over to them the proceeds received from the sale thereof only as received, as herein provided." See *Ash Sheep Co. v. United States*, 252 U. S. 159. In 1915, however, the sale of the ceded lands was postponed indefinitely. On September 27, 1918, moreover, certain lands within the ceded portion of the reservation were withdrawn from public entry under the provisions of section 3 of the act of June 17, 1902 (32 Stat. 388), known as the Reclamation Act.

Article IV of the treaty expressly reserved to the Indians the right "to hunt on the unoccupied lands of the United States so long as game may be found thereon, and so long as peace subsists among the whites and Indians on the borders of the hunting districts." So long as the lands ceded under the act of March 3, 1905, remained vacant, these, too, might be regarded as "unoccupied lands." But in *Ward v. Race Horse*, 163 U. S. 504, the Supreme Court of the United States held that the right granted in Article IV of the treaty of July 3, 1868, to hunt on the unoccupied lands of the United States was by its very nature terminated by the admission of the State of Wyoming into the Union upon an equality with all other States. It is necessary, however, to consider whether the Indians retained hunting or fishing rights on the ceded lands free from State regulation by virtue of the trust character of the lands.

The extent of State criminal jurisdiction over ceded Indian lands held in trust by the United States has long been uncertain. The leading case on Indian ceded lands, *Ash Sheep Co. v. United States*, *supra*, was not technically a criminal proceeding but a suit under section 2117 of the Revised Statutes by which a penalty was imposed for pasturing horses, mules, or cattle "on any land belonging to any Indian or Indian tribe." The court held that because they were ceded in trust the lands remained "Indian lands" within the meaning of the

statute, and that the Indians were entitled to the amount of the penalty. The court reasoned that since "any benefits which might be derived from the use of the lands would belong to the beneficiaries and not to the trustee," they "did not become 'Public lands' in the sense of being subject to sale, or other disposition, under the general land laws." (p. 166.) The court thus reaffirmed its earlier declarations to the same effect in *Minnesota v. Hitchcock*, 185 U. S. 373, and *United States v. Mille Lac Band of Chippewa Indians in the State of Minnesota*, 229 U. S. 498. See also 19 Op. Atty. Gen. 117. In consequence of these decisions this Department has always held that Indian lands ceded in trust are "Indian lands," in the sense that the Indians have an equitable interest in the proceeds derived from their disposition, and "public lands" in the sense that they are subject to disposition under the public land laws although only in limited ways and upon certain conditions. (56 I. D. 330.)

In a number of State cases involving the question of the power of a State to apply its conservation laws to Indians on lands ceded by them outright rather than in trust so that they were in no sense Indian lands, the jurisdiction of the State has been upheld except when, as in *State v. Cloud*, *supra*, the game violation was committed by the Indian on an allotment held in trust for him by the United States on the ceded portion of the reservation. *State v. Morrin*, 117 N. W. 1006 (Wis.); *People v. Chosa*, 233 N. W. 205 (Mich.); and *State v. La Barge*, 291 N. W. 299 (Wis.). These decisions were based upon the authority of such cases as *United States v. Winans*, 198 U. S. 371, and *Kennedy v. Becker*, 241 U. S. 556, involving treaty rights to fish on ceded lands. While these cases are distinguishable,⁴ they necessarily assumed that a reserved treaty right to hunt or fish on non-Indian land was a right of property rather than of sovereignty. In the *Winans* case, the court declared that the existence of the treaty right did not "restrain the State unreasonably, if at all, in the regulation of the right." In the recent case of *Tulee v. State of Washington*, 315 U. S. 681, while the court denied the power of the State to require Indians to obtain a State license before they could exercise a reserved treaty right of fishing on non-Indian lands, it pointed out that "the treaty leaves the State with power to impose on Indians, equally with others * * * restrictions of a purely regulatory nature * * *."

⁴ In the *Winans* case the interference with the treaty fishing right was by private persons while in *Kennedy v. Becker* the cession was to Robert Morris, a private individual, rather than to the United States. In both cases the court said that by virtue of the treaty the Indians acquired an easement but that this was subject to State regulation.

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If the existence of a treaty right to hunt on non-Indian lands is insufficient to manifest an exclusive interest in the United States, it may well be asked whether there is any reason of policy for denying State jurisdiction on lands ceded in trust under an agreement containing no express reservation of hunting or fishing rights, but which are nevertheless constituted "Indian" lands as a result of the agreement. The fact that such lands are also, in a sense "public" lands complicates the question. To avoid confusion of thought it will be best to examine it in terms of the realities of the situation rather than in terms of this Janus-faced concept.

When lands have been ceded by the Indians under an agreement contemplating the sale of the lands to non-Indian settlers with the proviso that the proceeds derived from the sale of the lands shall be held for or paid to the Indians, it is apparent that the latter still have certain property rights in the lands. They are the beneficial owners of the lands, and to protect their rights a trust is impressed upon the lands themselves. It would be difficult to deduce from such an agreement, however, that they intended to reserve any rights of sovereignty over such lands. Since the lands are to be sold, they could not intend to make their homes upon them, nor to employ them as game preserves to the exclusion of any white settlers. The right of occupancy, as well as the title, would be in the Federal Government, for a trustee has the right to possession as well as the legal title. If the Indians intended to reserve any rights which were not implied in the terms of the trust itself, it would have been easy to set them forth in the agreement. Indeed, in the case of the earlier land cessions, when the Indians ceded their lands outright, they frequently made an express reservation of the right to hunt or fish on the ceded lands. No such express reservation, however, is to be found in the act of March 3, 1905. I must, therefore, conclude that when the Indians agreed to the sale of their lands they necessarily surrendered rights of sovereignty over them.

b. But it is still necessary to determine whether the United States had any such interest in the ceded lands that the State was barred from exercising its police power over them. Although the tribal councils no longer could regulate hunting and fishing on the ceded lands, such a power, it might be argued, was vested in the Secretary of the Interior as conservator of the public domain.

There is no doubt, however, that the State can enforce its conservation laws on public lands. The Federal Government, to be sure, if necessary to protect its interests in such lands may disregard State conservation laws but in the absence of an overriding Federal interest, they remain applicable. Although it has been held that, under au-

thority conferred by statute, Federal administrative officers could proceed to exterminate deer committing depredations in a national forest despite inhibitions of State conservation laws, it is implicit in this decision that the State conservation laws would normally have governed (*Hunt v. United States*, 278 U. S. 96). Federal jurisdiction over game in a national forest was based on an express cession of State jurisdiction in *Chalk v. United States*, 114 F. (2d) 207 (C. C. A. 4, 1940). As said by Mr. Justice Brandeis in *Omaechevarria v. Idaho*, 246 U. S. 343, 346:

* * * The police power of the State extends over the federal public domain, at least when there is no legislation by Congress on the subject. * * *

The crucial question in determining the applicability of State conservation laws to ceded Indian lands is whether the exercise of this jurisdiction will interfere with or embarrass the Federal Government in the execution of the purpose for which it holds the lands. Even if State jurisdiction over such lands be conceded, still it does not extend, as the court said in *Utah Power & Light Co. v. United States*, 243 U. S. 389, 404:

* * * to any matter that is not consistent with full power in the United States to protect its lands, to control their use and to prescribe in what manner others may acquire rights in them.

See also *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525; *Arlington Hotel Company v. Fant*, 278 U. S. 439; *Surplus Trading Company v. Cook*, 281 U. S. 647; *James v. Dravo Contracting Co.*, 302 U. S. 134; *Stewart & Co. v. Sadrakula*, 309 U. S. 94. The general rule was specifically applied to an Indian reservation in the *Surplus Trading Company* case.

I fail to perceive, however, any overriding Federal interest which would justify regulation by the Secretary of the Interior of hunting and fishing on the ceded lands. Such lands, to be sure, are "public lands" in a qualified sense, but this qualification extends only to the manner of disposition of the ceded lands and the payment of the proceeds derived from their sale. Since the Indians in ceding their lands for disposition to white settlers terminated the sovereignty of the tribe over them, and the Federal Government in acquiring title to the lands acquired only such jurisdiction as would enable it to discharge the terms of the trust, I must conclude that the police power of the State attached to the ceded lands at the moment of cession. As conservator of the public domain, the Secretary of the Interior could

⁵ See also H. R. Fields, "Jurisdiction Over Nationally Owned Areas and National Parks," 24 Calif. L. Rev. 573-79; F. W. Laurent, "Federal Areas Within Exterior Boundaries of States," 17 Tenn. L. Rev. 328-54; M. N. Orfield, "Extent of Federal Jurisdiction Over Wildlife," 16 Nebr. L. Bull. 164-71.

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not interfere with the exercise of the State police power, and there was nothing in the nature of the cession which required that the Secretary should have any greater power over the ceded lands than he could exercise over public lands in general.

This conclusion is in no way modified by the fact that when admitted into the Union the State of Wyoming by accepting the Enabling Act disclaimed "all right and title * * * to all lands lying within said limits owned or held by any Indian or Indian tribes," and promised that until the title to such lands had been extinguished by the United States, they should remain "subject to the disposition of the United States" and "under the absolute jurisdiction and control of the Congress of the United States." This language furnishes no sure guide to the power of the State over the ceded lands. The exercise of the police power of a State does not depend on "title" any more than the jurisdiction of the United States depends upon title (*United States v. Thomas*, 151 U. S. 577), but rests upon the sovereignty of the State. There would, moreover, also be the question whether ceded lands may be said to be "owned or held by any Indian or Indian tribes" since the legal title at least is in the United States. Wyoming also has a general statute authorizing the United States to acquire lands in the State "by purchase, condemnation or otherwise" for governmental purposes and ceding jurisdiction to the United States over the lands thus acquired, but it is doubtful, particularly in view of the rule that such cessions of jurisdiction by a State are to be strictly construed,⁶ that the statute would be held applicable to Indian lands ceded to the United States in trust. In the *Six Cos.* case an almost identical statute was held inapplicable to a withdrawal of public lands in connection with the Boulder Canyon project.

I must add, however, one qualification to the conclusion that the State may regulate hunting and fishing on the ceded lands. The decision in *Ash Sheep Co. v. United States*, *supra*, requires that in the absence of any congressional direction to the contrary all proceeds of ceded lands go to the Indians who ceded the lands. In this case this rule was even applied to a cash penalty which was, of course, not mentioned expressly in the act of cession as a possible source of income. I think that it is in accord with the spirit as well as the letter of this rule that the State should not be permitted to make its conservation program a means of obtaining revenue from the ceded lands. An intention to do so need not be implied, however,

⁶ *Six Cos. v. De Vinney*, 2 F. Supp. 693 (D. C. D. Nev.); *State v. Mendez*, 61 P. (2d) 300 (Nev.); *Valley County v. Thomas*, 97 P. (2d) 345 (Mont.).

from the mere fact that the State requires the payment of fees in issuing licenses to hunt or fish on the ceded lands. The collection of such license fee may be justified if it is necessary to finance a conservation program and if it does not go beyond what is reasonably necessary for this purpose. The distinction between a license as an incident of regulation and a license as a means of obtaining revenue had long been familiar in cases involving the power of a State to exert its police power in the realm of interstate commerce, and was expressly recognized in the opinion in the *Tulee* case.

5. There are, however, special circumstances applicable to the Wind River Reservation that will complicate the problem of jurisdiction over hunting and fishing upon the ceded lands. Congress in 1939 enacted the Shoshone Judgment Act already mentioned. The act set aside \$1,000,000 of the fund resulting from the judgment in *U. S. v. Shoshone Tribe*, 304 U. S. 111, for the acquisition of lands in the ceded as well as the diminished portion of the reservation. Land-use districts were to be established in both portions of the reservation, and the Secretary of the Interior was authorized under such rules and regulations as he might prescribe "to effect the consolidation of Indian and privately owned lands within said districts" through a land acquisition program. Title to all lands so acquired was to be taken by the United States in trust for the Shoshone and Arapahoe Tribes of Indians of the Wind River Reservation. The statute further directed the Secretary of the Interior "to restore to tribal ownership all undisposed-of surplus or ceded lands within the land use districts which are not at present under lease or permit to non-Indians; and, further, to restore to tribal ownership the balance of said lands progressively as and when the non-Indian owned lands within a given land use district are acquired by the Government for Indian use."

Although the Shoshone Judgment Act did not, in any technical sense, repeal the act of March 3, 1905, it arrested the process of alienating the ceded lands. The sale of the lands under this act of cession had already been indefinitely postponed by the departmental action of 1915. Moreover, unlike section 3 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 25 U. S. C. sec. 463(a)), which only authorized the Secretary of the Interior to restore to tribal ownership the remaining surplus lands of any Indian reservation "if he shall find it to be in the public interest," section 5 of the Shoshone Judgment Act contained an express directive requiring

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the restoration of the vacant ceded lands. The program of reacquisition and restoration has already been fulfilled in large measure.⁷

So far as concerns the lands already restored to tribal ownership under the Shoshone Judgment Act, the jurisdiction of the tribal councils must be deemed to be the same as over other tribal lands within the exterior boundaries of the diminished portion of the reservation, and they may therefore regulate hunting and fishing on the restored lands. There would seem to be no basis for distinguishing between such lands and lands which have been formally designated as "reservations" by Executive order, treaty, or act of Congress. An Indian reservation is simply a part of the public domain set apart by proper authority for use and occupation by a group of Indians. *Forty-three Cases Cognac Brandy*, 14 Fed. 539 (C. C. D. Minn.). The United States holds the title, and the right of use and occupancy is in the Indians. This is precisely the state of the title under the Shoshone Judgment Act, since it provides that title is to be taken by the United States in trust for the Indians. It is true that the Shoshone Judgment Act does not expressly provide for the formal incorporation of the restored lands in the reservation, but no particular form of words is necessary to create a reservation. "It is enough that from what has been done there results a certain defined tract appropriated to certain purposes." *Minnesota v. Hitchcock*, 185 U. S. 373, 390. See also *Spalding v. Chandler*, 160 U. S. 394; *Northern Pacific Railway Company v. Wismer*, 246 U. S. 283; *United States v. Payne*, 8 Fed. 883 (D. C. W. D. Ark.). In the *Wismer* case the court recognized as a reservation a tract of land that had been set aside for Indian occupancy by the Commissioner of Indian Affairs with the tacit approval only of the Secretary of the Interior rather than by an Executive order of the President. In the recent case of *United States v. McGowan*, 302 U. S. 535, the court applied the Federal Indian liquor laws to the Reno Indian Colony located on lands purchased by the United States in order to settle the Indians upon them. The court held that it was immaterial that these lands were not designated as a "reservation."

These cases establish that there is no peculiar virtue in the word "reservation," and that there is no magic formula nor special ceremony by which a reservation must be conjured into existence. It

⁷ By the act of March 3, 1905, the Shoshone Indians ceded to the United States in trust 1,438,633 acres of land. Of the vacant ceded land 226,019.64 acres have already been restored to tribal ownership. Another order to restore an additional 7,500 acres is pending. Other tracts aggregating 63,503.49 acres have been repurchased, and 8,650 acres are under purchase contract; 345,760 acres have been withdrawn for reclamation purposes and are therefore no longer subject to private alienation. Before the purchase program began only 196,360 acres had been alienated.

is no more necessary to deposit a piece of parchment in the archives than to smoke a pipe of peace. To be sure, these cases do not establish that a reservation must necessarily be deemed to be created whenever the United States takes title to land in trust for Indians, or for their benefit. If the United States were to purchase isolated tracts for individual Indians, or a tract for a group of Indians who no longer maintained tribal relations, or were not subjected to the supervisory authority and guardianship of the United States, there might be no basis for contending that such lands constituted a reservation. Such is the purport of the decision in the case of *State v. Shepard*, 300 N. W. 905 (Wis.), in which the State Supreme Court held that various noncontiguous tracts, purchased for the Pottawatomie Indians by the United States were not reservation lands and that, therefore, a tribal Indian could be arrested for violating the conservation laws of the State. The Court distinguished the *McGowan* case on the ground that these Indians were not subject to the supervision of the United States. Assuming the validity of this distinction, the case is entirely in harmony with the current of authority.

When, however, looking to what has been done, it can be perceived that lands have been set apart for Indian tribal use and occupancy, and that the Indians for whom the lands have been acquired are to come or to remain under the superintendence of the United States, such lands are not distinguishable from any other reservation lands. Certainly this is true of the lands acquired for the Shoshone Indians. The moneys with which they were to be purchased were appropriated by way of compensation to the Indians for the wrong they had suffered when their tribal use and occupancy had been disturbed. By directing that the lands were to be restored to "tribal ownership," Congress indicated that they were to be open to tribal use and occupancy. By providing for the consolidation of Indian lands in both the diminished and ceded portion of the reservation, Congress plainly indicated its intention of creating a solid reservation tract. A reservation so designed would, indeed, be superior to the checkerboarded reservations of other Indian tribes. Thus would needed lands be provided for the Shoshone Indians at the same time that the integrity of tribal life was restored. That such was the whole objective of the program appears clearly from the testimony of various representatives of the Indian Office before the Committee on Public Lands. (Hearings, 77th Cong., 1st sess., pursuant to S. Res. 241, pp. 602 ff.)

I can find no act of Congress, moreover, which is inconsistent with these general principles. Indeed, the act of February 14, 1923 (42 Stat. 1246, 25 U. S. C. sec. 335), provides that the provisions

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of the General Allotment Act, as amended, "are extended to all lands heretofore purchased or which may be purchased by authority of Congress for the use or benefit of any individual Indian or band or tribe of Indians." The Supreme Court has declared that the reference to Executive order reservations contained in section 1 of the General Allotment Act should be taken to confirm by implication the practice of establishing reservations by Executive order: *In re Wilson*, 140 U. S. 575; *United States v. Midwest Oil Company*, 236 U. S. 459; *Mason v. United States*, 260 U. S. 545. It may therefore be argued that by extending the provisions of the General Allotment Act to purchased lands the creation of reservations by purchase was sanctioned, at least when the purchase was specifically authorized by act of Congress. In any event, it could not be contended that, by subjecting purchased lands to the provisions of the General Allotment Act, Congress made the formal proclamation of a reservation, a *sine qua non* of reservation status.

It is true that it is provided by section 4 of the act of March 3, 1927 (44 Stat. 1347, 25 U. S. C. sec. 398d), that "changes in the boundaries of reservations created by Executive order, proclamation, or otherwise for the use and occupation of Indians shall not be made except by Act of Congress;" but any change in the boundaries of the Shoshone Reservation will result in this case from an act of Congress, namely, the Shoshone Judgment Act itself. I see no reason for assuming that the act of March 3, 1927, contemplated that any change in the boundaries of a reservation must be expressly authorized by an act declaring *pro modo et forma* that the change may be made, and describing the new boundaries by metes and bounds. Congress must be deemed to have been aware of the doctrine that no special form or ceremony was necessary to create a reservation.

Finally, I think that no unfavorable implication is to be drawn from the fact that section 7 of the Indian Reorganization Act (48 Stat. 984, 986, 25 U. S. C. sec. 467) gives the Secretary of the Interior express authority to proclaim new Indian reservations on lands acquired pursuant to the provisions of the act, while the Shoshone Judgment Act contains no such formal provision. The Indian Reorganization Act was designed to apply to every type of reservation, wherever located, and whether the lands purchased were within or without existing reservations. It was, no doubt, thought desirable that there should be express authority for the incorporation of purchased lands which conceivably in some cases might not be contiguous to existing reservation lands. In any event a provision for formal incorporation in one case does not necessarily rule out the possibility

of informal incorporation in another. Moreover, in view of the uncertainty regarding the status of ceded lands which is apparent from the very request for this opinion, it may have been assumed that such lands were a part of the reservation over which the tribe was entitled to maintain jurisdiction, and that therefore no formal reincorporation would be necessary.⁸

I must finally point out also that to some extent the question whether the restored lands are to be deemed part of the reservation is academic in the circumstances of the present case. If the tribal councils have no rights of sovereignty over the restored lands, they have the right of dominion always possessed by a landowner. By virtue of this dominion they can exclude nonmembers of the tribe from hunting or fishing on the restored lands, or may permit such activities upon prescribed conditions. The tribal councils by a resolution adopted April 9, 1941, have indeed expressly required that nonmembers of the tribe to whom tribal fishing permits are issued shall also obtain proper State licenses. However, it is true that if the tribal councils do not possess rights of sovereignty, members of the tribes would also be obliged to comply with the State conservation regulations in addition to their own.

6. I have been asked to pass on a subsidiary question whether section 216, 25 U. S. C., would be violated by any non-Indian who hunted without proper authorization upon the restored lands. This section subjects to a penalty "Every person, other than an Indian, who, within the limits of any tribe with whom the United States has existing treaties, hunts, or traps, or takes and destroys any peltries or game, except for subsistence in the Indian country * * *." From what I have already said concerning the incorporation of the restored lands in the reservation, it follows that any hunting within the prohibition of the statute would be within the "limits" of the tribe. The condition of the statute that it shall apply only to lands of tribes "with whom the United States has existing treaties" is satisfied by the treaties of the United States with the Shoshone Indians made July 2, 1863, and July 3, 1868. If it is necessary under the statute that the treaties be of a kind which in effect guarantee

⁸ My conclusion makes it unnecessary to consider the possibility that the ceded lands never ceased to be part of the reservation, despite the fact that the police power of the State attached to such lands, so that for this reason alone no reincorporation is necessary. It may in this connection be noted that the Supreme Court has declared in general terms that allotment in severalty does not have the effect of withdrawing the land from a reservation and that it remains a part thereof until Congress has excluded it (*United States v. Celestine*, 215 U. S. 278, 284), although it did not pass on the precise question whether the issuance of a patent in fee would have this effect. In fact a reservation is not a grant and has nothing to do with title (*Alaska Pacific Fisheries v. United States*, 248 U. S. 78, 88). Lands ceded in trust can hardly be regarded as in a worse position than lands patented in fee.

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the tribe against trespass, this condition, too, is met by the treaty of July 3, 1868, which provided for "the absolute and undisturbed use and occupation" of the country described therein by the Shoshone Indians, and forbade all other persons to "pass over, settle upon, or reside in" this territory. It is true that the treaties were with the Shoshone and not the Arapahoe Indians, but the interests of the tribes in the lands of the reservation are undivided, and hence the statute would apply to the reservation as a whole.

It would seem also that the prohibition of the statute is not absolute and that the tribal councils may authorize hunting on their lands. The statute was for the protection of the Indians, and cannot therefore be violated with their consent (*Cook v. Hudson*, 103 P. (2d) 137, 148 (Mont.)). This same opinion holds that statutes of the type of section 216, 25 U. S. C., "are directory in form and not mandatory," and that consequently: "Whether any action be taken or not appears to be at the discretion of those upon whom the duty is imposed to protect Indian rights from invasion." The statute may therefore be invoked when necessary and desirable as a penalty against those who hunt without proper authority upon the restored lands. But this would mean that the statute could be invoked only against persons who hunted without first obtaining a permit or license. I do not think that the statute could be made into a mechanism of enforcing violations of particular conservation regulations, since it plainly was designed to punish trespass and not to implement conservation regulations. (*Cf. United States v. Hunter*, 21 Fed. 615 (C. C. E. D. Mo.).)

7. In view of the conclusion that the tribal councils are without power to regulate hunting or fishing on the ceded lands which have not been restored to tribal ownership, it must follow that Ocean Lake on the ceded portion of the reservation is also subject to the jurisdiction of the State, and it is unnecessary to consider the special circumstances that as presently constituted it is an artificial lake constructed partly on fee-patented lands, and located entirely within an area withdrawn for reclamation purposes under the Reclamation Act. It is clear that the reclamation withdrawal in no way enlarges the power of the United States, for lands withdrawn for reclamation purposes have always been held to be subject to the police power of the States to the same extent as all other public lands. It is apparent, too, that under existing law State jurisdiction over Ocean Lake must continue in view of the provision of section 5 of the Shoshone Judgment Act prohibiting the restoration to tribal ownership "of any lands within any reclamation project." I am not informed whether Ocean Lake is completely surrounded by a solid belt of

restored lands, and so there is no need to determine whether the tribal councils would be in a position to exercise any indirect degree of control over fishing in Ocean Lake by denying access to the lake shores.

8. Thus the jurisdiction of the tribal councils and the State of Wyoming conservation authorities over the ceded portion of the reservation will be of a mixed character, with each having jurisdiction over a part of the lands involved. Inconveniences may, however, readily be avoided by cooperative agreement. I note that the State conservation authorities are expressly authorized to "enter into cooperative agreements with Federal agencies * * * and land-owners for the development of State control of wildlife management and demonstrations projects." (1931 Wyo. Stats., 1940 Supp., Title 49, sec. 111, subsec. (i).) The tribal councils have, of course, a corresponding power to undertake cooperative action.

To summarize, I am of the opinion:

(1) That the tribal councils may regulate hunting and fishing on the diminished portion of the reservation by Indians as well as non-Indians, and in particular that they may regulate fishing on Bull and Ray Lakes on the diminished portion of the reservation.

(2) That the State may regulate hunting and fishing on the ceded portion of the reservation, including fishing in Ocean Lake, except as to such ceded areas as may be restored to tribal ownership pursuant to the provisions of the Shoshone Judgment Act on which the tribal councils may regulate hunting and fishing.

(3) That the requirement of State licenses to hunt or fish on the ceded portion of the reservation may not, however, be made a means of raising revenue.

(4) That section 216, 25 U. S. C., is applicable to the restored lands but that it may be invoked only against non-Indians who hunt upon the lands without a license.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

LIABILITY OF THE GOVERNMENT OF THE UNITED STATES FOR TAXES ON INCOME FROM PROPERTIES IN THE VIRGIN ISLANDS

Opinion, February 17, 1943

VIRGIN ISLANDS COMPANY—COMPANY REQUIRED TO PAY TAXES WHICH A PRIVATE CORPORATION SIMILARLY SITUATED WOULD BE REQUIRED TO PAY—SIMILAR PAYMENTS TO BE MADE WITH RESPECT TO ANY PROPERTY OWNED BY THE GOVERNMENT OF THE UNITED STATES IN THE VIRGIN ISLANDS—APPLICATION OF SECTION 306 OF THE LANHAM ACT.

February 17, 1943

The Government of the United States, through the Federal Works Administrator, has acquired, under the Lanham Act, fee title to the power plant and transmission lines and a leasehold interest in the docks and appurtenant facilities at Charlotte Amalie, St. Thomas, Virgin Islands. These properties are operated, maintained and managed by The Virgin Islands Company as agent for the Federal Works Administrator. Under section 5 of the act of May 26, 1936 (49 Stat. 1372, 48 U. S. C. sec. 1401(d)), The Virgin Islands Company is required to pay into the municipal treasuries of the Virgin Islands amounts equal to the amounts of any taxes of general application which a private corporation similarly situated would be required to pay. The act further requires the payment of taxes on any property owned by the United States in the Virgin Islands which is used for ordinary business or commercial purposes. The income derived from any property so used is to be made available for making such payments. This obligation is not inconsistent with section 306 of the Lanham Act which relates only to payments in lieu of real property taxes.

GARDNER, *Solicitor*:

Under the Lanham Act, as amended (act of October 14, 1940, 54 Stat. 1125; act of June 28, 1941, 55 Stat. 361), the United States, acting through the Federal Works Administrator, has acquired fee title to the power plant and transmission lines and a leasehold interest in the docks and appurtenant facilities at Charlotte Amalie, St. Thomas, Virgin Islands. These properties are being operated, maintained and managed by The Virgin Islands Company as agent for the Federal Works Administrator, under an arrangement whereby the Company derives no profit from its services but is merely reimbursed for costs and expenses incurred. You [Director, Division of Territories and Island Possessions] have requested my views as to whether, under the provisions of section 5 of the act of May 26, 1936 (49 Stat. 1372, 48 U. S. C. sec. 1401d), the Municipality of St. Thomas and St. John, Virgin Islands, is entitled to receive an amount equal to the Federal tax on the income accruing from the operation of these properties.

Section 5 of the act of May 26, 1936, *supra*, provides:

The Virgin Islands Company shall pay annually into the municipal treasuries of the Virgin Islands in lieu of taxes an amount equal to the amount of taxes which would be payable on the real property in the Virgin Islands owned by the United States and in the possession of the Virgin Islands Company, if such real property were in private ownership and taxable, but the valuation placed upon such property for taxation purposes by the local taxing authorities shall be reduced to a reasonable amount by the Secretary of the Interior if, after investigation, he finds that such valuation is excessive and unreasonable. The Virgin Islands Company shall also pay into the municipal treasuries of the Virgin Islands amounts equal to the amounts of any taxes of general application which a private corporation similarly situated would be required to pay into the said treasuries. Similar payments shall be made with respect

to any property owned by the United States in the Virgin Islands which is used for ordinary business or commercial purposes, and the income derived from any property so used shall be available for making such payments.

The first sentence of that section has no bearing on the question propounded since it relates only to payments in lieu of real property taxes. Under the second sentence, however, The Virgin Islands Company is directed to pay into the municipal treasuries of the Virgin Islands "amounts equal to the amounts of any taxes of general application which a private corporation similarly situated would be required to pay." And under the third sentence, a similar obligation is created "with respect to any property owned by the United States in the Virgin Islands which is used for ordinary business or commercial purposes."

The Federal income tax law is applicable in the Virgin Islands (act of July 12, 1921, 42 Stat. 123, 48 U. S. C. sec. 1397). But, since The Virgin Islands Company is to receive no compensation (net income) for its services in connection with the operation of the St. Thomas properties, obviously no income tax will be payable to the Municipality of St. Thomas and St. John by the Company on its own behalf. It is my understanding, however, that the properties are being operated at a profit, which presumably is being credited to the Federal Works Agency. Accordingly, under the last sentence of section 5 of the act of May 26, 1936, the payment of income taxes, in an amount equal to the tax which would be payable by a private corporation on such net earnings, is required to be made to the municipality by the Federal Works Agency and is a proper charge against the income from the project.

There remains for consideration, however, the question whether that provision of the act of May 26, 1936, which applies to all Federal properties in the Virgin Islands used for ordinary business or commercial purposes, is repealed or superseded by section 306 of the Lanham Act, as amended, in so far as properties acquired under the Lanham Act are concerned. Section 306 of the Lanham Act, as amended, provides:

The Administrator may enter into any agreements to pay annual sums in lieu of taxes to any State or political subdivision thereof, with respect to any real property acquired and held by him under this Act, including improvements thereon. The amount so paid for any year upon any such property shall not exceed the taxes that would be paid to the State or subdivision, as the case may be, upon such property if it were not exempt from taxation.

That section contains no reference to section 5 of the act of May 26, 1936. Therefore, a conclusion that the broad mandate contained in the last sentence of section 5 of the act of May 26, 1936, is super-

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seded by the limited authority conferred by section 306 of the Lanham Act must be based upon implication only. "Repeals by implication, however, are not favored by the courts; and such repeals will not be recognized unless the intent to repeal is clear, or the provisions of the two statutes are wholly incompatible." 39 Op. Atty. Gen. 50, 55. See, also, *Posadas v. National City Bank*, 296 U. S. 497, 503.

I have been unable to find in the legislative history of the Lanham Act any indication that Congress intended to repeal or supersede the last sentence of section 5 of the act of May 26, 1936, with respect to projects undertaken in the Virgin Islands. Nor are the two provisions wholly inconsistent with each other.

The last sentence of section 5 relates to payments equal to any taxes of general application which a private corporation similarly situated would be required to pay. Section 306, however, is much narrower in scope and relates only to payments in lieu of real property taxes. In so far as the two provisions cover the same subject matter, they would appear to be somewhat inconsistent in that the former is mandatory whereas the latter is discretionary. But to the extent that the last sentence of section 5 of the act of May 26, 1936, requires payments in lieu of taxes, other than and in addition to real property taxes, there is no conflict or inconsistency with section 306 of the Lanham Act. Accordingly, "both statutes 'may well subsist together', the later statute superseding the earlier one only to the extent of its application." 39 Op. Atty. Gen. 102, 105.

I conclude, therefore, that, under the last sentence of section 5 of the act of May 26, 1936, the payment of an amount equal to the amount of income taxes which would be payable by a private corporation is required to be made by the Federal Works Agency to the Municipality of St. Thomas and St. John with respect to the net earnings derived from the operation of the St. Thomas properties.

THE POWER OF THE NAVAJO TRIBE TO LEASE TRIBAL LAND TO THE GOVERNMENT FOR A HELIUM PLANT

Opinion, February 19, 1943

INDIAN LANDS—BUREAU OF MINES—HELIUM.

The fee simple title to the land is in the United States with the right of use and occupancy in the Navajo Tribe of Indians. The United States may enter into a lease with the Navajo Tribe with the consent of the tribe and the approval of the Secretary. While the act of June 30, 1834 (4 Stat. 729), prohibits the sale or lease of lands by Indian tribes or nations, the prohibition does not extend to the sovereign. The Bureau of Mines is authorized to erect permanent improvements on leased lands

pursuant to the act of September 1, 1937 (50 Stat. 885). The opinion of the Attorney General as to the validity of title pursuant to Rev. Stat. 355, as amended, is unnecessary.

GARDNER, *Solicitor*:

Reference is made to the informal request of Mr. R. A. Cattell, Chief, Petroleum and Natural Gas Division, for an opinion as to whether the Bureau of Mines may expend public funds for the construction of a helium plant on lands leased from the Navajo Indian Tribe within the Navajo Reservation in New Mexico for the purpose of processing helium from natural gas. The plant is to be constructed on a part of the reservation not covered by an oil or gas lease owned by the United States.

The treaty with the Navajo Tribe of Indians, approved June 1, 1868 (15 Stat. 667), set aside certain designated lands in New Mexico and Arizona for the use and occupancy of the Navajo Indians. The United States, under the treaty, retained the fee title to the lands, subject to the right of the use and occupancy thereof by the Navajo Indians. The land under consideration is within the reservation as established by the treaty of June 1, 1868.

The act of September 1, 1937 (50 Stat. 885, 50 U. S. C. sec. 161), authorizes the Secretary of the Interior, for the purpose of conserving, producing, and selling helium gas:

To acquire by purchase, lease, or condemnation, lands or interests therein or options thereon, including but not limited to sites, rights-of-way, and oil or gas leases containing obligations to pay rental in advance or damages arising out of the use and operation of such properties;

To construct or acquire plants, wells, pipe lines, compressor stations, camp buildings, and other facilities, for the production, storage, repurification, transportation, and sale of helium and helium-bearing gas; * * *

The 1943 Interior Department Appropriation Act (Act of July 2, 1942, 56 Stat. 506), contains an appropriation for the acquirement by purchase, lease or condemnation of lands or interests therein.

The question whether the Secretary is legally authorized to lease from the Navajo Tribe sufficient land for a plant site for such length of time as the United States shall operate the plant, must be considered (a) from the standpoint of the lessee and (b) from the standpoint of the lessor. From the standpoint of the lessee, it is sufficient that the act of September 1, 1937, *supra*, authorizes the acquisition of a leasehold interest. Such interest is sufficient to permit the contemplated use of the land for a plant site. Memorandum of November 18, 1939, from the Attorney General to the Assistant Attorney

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General, Lands Division, Department of Justice. See also 28 Op. Atty. Gen. 414.

From the standpoint of the lessor, the problem derives from the fact that there is no general legislation authorizing leases of tribal lands for purposes other than farming, grazing and mining. Tribal lands have been actually utilized under permits or under tribal leases of doubtful validity, for many other purposes, such as trading posts, power sites, summer cottages, and ordinary commercial development. Cohen, *Handbook of Federal Indian Law*, page 329. Existing departmental regulations (25 CFR 171.12) purport to authorize the lease of tribal lands for farming, grazing or business purposes for stated periods or through permits revocable in the discretion of the Commissioner of Indian Affairs.

The act of June 30, 1834 (4 Stat. 729, 25 U. S. C. sec. 177), reads as follows:

No purchase, grant, lease, or other conveyance of lands, or of any title or claim thereto, from any Indian nation or tribe of Indians, shall be of any validity in law or equity, unless the same be made by treaty or convention entered into pursuant to the Constitution.

While this statute would, on its face, prohibit a lease of tribal land even to an agency with general statutory power to acquire leasehold interests, consideration must be given to the rule that if a statute prohibits the doing of a certain thing and no specific mention of the United States is contained in the statute, the prohibition does not (with exceptions not here pertinent) extend to the sovereign. 26 Op. Atty. Gen. 415, 417; *United States v. California*, 297 U. S. 175, 176 (1936).

In an unreported opinion dated February 7, 1935, the Attorney General interpreted the Indian Reorganization Act of June 18, 1934 (48 Stat. 984), with particular reference to the status of the title to restricted lands being conveyed by individual Indians to the United States for various school purposes, including the erection of day school buildings for use of the Indian Service. The question whether the restrictions against alienation of the land would apply to the United States after it acquired title was considered in connection with the provisions of section 4 of the act of June 18, 1934, *supra*. The Attorney General held that:

To hold that a sale of restricted Indian lands to the United States, needed by the Government for the purpose of carrying out its policy of promoting the educational advancement of the Indians is within the ban of the statute, would, to that extent, abrogate that policy. It is a familiar rule that a general statute which takes away or limits any right, title or interest does not bind the sovereign unless the sovereign is expressly named therein (*United States v. Knight*, 14 Pet. 301, 315; *Dollar Savings Bank v. United States*, 19 Wall. 227, 239).

The right of the Secretary of the Interior to grant permission to the Presbytery of North Arizona to occupy a certain designated tract of land within the Navajo Treaty Reservation for religious mission purposes was presented to the Attorney General in 1921 (32 Op. Atty. Gen. 586). The Attorney General held that since the United States is the guardian and protector of the Indians, the Secretary has discretionary power to grant the use of the land to the church on the theory that it would be spiritually beneficial to the Indians. The construction of the helium plant on reservation lands will be a direct pecuniary benefit to the Navajo Tribe because the tribe will receive royalty from the helium processed in the plant that otherwise would not enure to their benefit. Therefore, the Secretary may in his discretion approve the lease in question.

It is my opinion that should the Navajo Tribal Council authorize a lease to the Government of certain designated land within the reservation for a helium plant site for so long as it is needed in connection with the processing of helium, and a lease be executed by the proper officers on behalf of the Navajo Tribe, and the Secretary approve the lease, the United States would hold a valid lease to the reservation land. The United States is authorized to pay a reasonable rental for the land in accordance with the provisions of the act of September 1, 1937, *supra*, and of the 1943 Interior Department Appropriation Act, *supra*.

In my opinion Rev. Stat. sec. 355, as amended (40 U. S. C. sec. 255), is not applicable to this leasehold acquisition as the fee simple title, subject to the Indians' right of occupancy, is in the United States, and the Attorney General's opinion as to the validity of the title to the land in question is unnecessary. Cohen, *Handbook of Federal Indian Law*, page 289, citing 6 Comp. Dec. 957.

LEGALITY OF INTEREST OF BUREAU OF MINES EMPLOYEE IN INVENTION USED IN MINING ENTERPRISE

Opinion, March 25, 1943

CONFLICT OF PRIVATE INTEREST AND PUBLIC DUTY—ORGANIC ACT OF BUREAU OF MINES—REGULATORY POWER OF DEPARTMENT—ASSIGNMENT OF EMPLOYEE INVENTIONS UNDER ORDER NO. 1763.

An officer of the United States may not engage in any private business activity which conflicts with the particular public office he holds. Sharing in the proceeds of a mercury or other mining lease is a private interest which conflicts with a public office the duties of which include the collection of economic and statistical information on the production, movement, treatment and marketing of ores and metals. The obtaining for the use of a mineral prospecting invention of compensation not dependent on

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production of a mine or interest in a mine does not conflict with such a public office.

Irrespective of any conflict of interest, a member of the Bureau of Mines is prohibited by section 4 of the act of February 25, 1913 (37 Stat. 681), from having any interest in a mine or in the proceeds of a mine concerning which the Bureau of Mines is conducting any investigation or economic or other inquiry.

The private business interests of officers and employees of the Bureau of Mines may be restricted by regulations issued by the Secretary of the Interior.

An official of the Bureau of Mines, whose invention was made prior to November 17, 1942, and outside the general scope of his governmental duties, is not required by Secretary's Order 1763 of November 17, 1942, to assign his invention to the United States and may own and control his invention, irrespective of whether its use may be in a mine which is the subject of investigation or inquiry by the Bureau of Mines.

GARDNER, *Solicitor*:

My opinion has been requested on the following questions involving the relationship of M, an official of the Bureau of Mines, to the development and operation of a mining enterprise located with the aid of an invention which he has helped develop for the discovery of minerals:

1. May he share in the ownership and control of the invention?
2. May he share in the proceeds of any mining enterprise located or developed with that invention?
3. May he share in the proceeds of such enterprise if the enterprise or property involved should be explored or investigated by the Bureau of Mines under its program for the development of strategic minerals or otherwise?
4. Does the Director of the Bureau of Mines have authority, regardless of whether an employee has any right to share in the rewards arising from any invention connected with mining for which he is wholly or partly responsible, to require that employees of the Bureau of Mines shall not have any financial interest in mining ventures?

The record indicates that these questions arise in the following circumstances:

M, an official of the Bureau of Mines who is in charge of a field office of the Economics and Statistics Service of the Bureau of Mines, has, in cooperation with another person not a Government employee, developed a geophysical process for prospecting mineral ore bodies. All the work that M has done in developing that process has been on his own time and at his own expense. His position in the Bureau as mineral economist involves economic and statistical work; he is not

assigned to laboratory investigations nor do his offices have such facilities. His invention is geophysical, was conceived on field trips and in a laboratory not under the Bureau, and, it is stated, without the aid of Government information not available to the public. The invention, apparently made prior to November 1942, has not yet been patented because of its confidential nature and the impracticality of detecting infringements. The process is about to be tested commercially on a prospective mercury ore body located by means of the invention on lands subsequently leased by M's associate. They have agreed that M is to have no interest in the land itself, but shall receive 40 percent of the net profits, if any, on account of his interest in the invention; that his associate shall receive 40 percent on account of his interest in the invention, plus 20 percent on account of his ownership of the lease; and that the associate may request the Bureau of Mines to consider this property under its strategic minerals development program.

I

May M share in the ownership or control of his invention for the discovery of minerals?

I shall here consider this question on the basis of the absence of any official connection by the Bureau of Mines with the mining enterprise in which the invention is to be used and shall discuss the presence of such official connection by the Bureau of Mines in Part III.

There is no statute or regulation prohibiting an employee of the Bureau of Mines from having the ownership or control of an invention, or a share therein, under the circumstances here indicated. Nor is M required by Secretary's Order No. 1763 of November 17, 1942 (7 F. R. 10161), to assign to the United States any of his rights in that invention. First, the order is expressly applicable only to inventions made during the period of employment after November 17, 1942. His invention was apparently made before that date. Second, the record before me does not indicate that the invention was made within the general scope of M's governmental duties, or that it arose in the course of any research or investigation or supervision thereof or in the general field of an inquiry to which he was assigned, or that it was developed through the use of Government facilities, financing or time, or with the aid of Government information not available to the public. Inventions not so made are not covered by Order 1763. Consequently, M may exercise whatever rights he may have to the invention, including, if he desires, the right to make an application for a patent thereto.

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II

May M share in the proceeds of a mining enterprise located or developed with that invention?

In view of the form of question III, I take it that question II relates to a situation where the mining enterprise is not under investigation by the Bureau of Mines, or otherwise connected in any way with the Bureau of Mines.¹ Consequently, section 4 of the act of February 25, 1913 (37 Stat. 681, 682, ch. 72, 30 U. S. C. sec. 6), which forbids any member of the Bureau of Mines from having "any personal or private interest in any mine or the products of any mine under investigation," would not be applicable. Solicitor's Opinion M. 28087 (August 6, 1935); 48 Cong. Rec. part 8, p. 7723, 62d Cong., 2d sess. (June 5, 1912).

There is no statute or regulation prohibiting an employee of the Bureau of Mines from carrying on a private business activity for compensation or profit when that activity is unrelated to any business of the Federal Government. 40 Op. Atty. Gen. No. 47 (April 27, 1942); 32 Op. Atty. Gen. 309 (1920). If, however, the business activity of any public officer is in any way incompatible with the duties of his public employment, he must abstain from one or the other. Attorney General Biddle has recently had occasion to reach the following conclusions (40 Op. Atty. Gen. No. 47):

Apart from statute, there are certain principles of fair dealing which have the force of law and which are applicable to all officers of the Government. A public office is a public trust. No public officer can lawfully engage in business activities which are incompatible with the duties of his office. He cannot in his private or official character enter into engagements in which he has, or can have, a conflicting personal interest. He cannot allow his public duties to be neglected by reason of attention to his private affairs. See *United States v. Carter*, 217 U. S. 286, 306. Such conflicts of interest are not tolerated in the case of any private fiduciary, and they are doubly proscribed for a public trustee.

For this rule to apply there must be a "clear conflict of interests between the particular public office and the particular private business activity." The Director has approved the finding of the responsible bureau official that the sharing of the proceeds of this mercury mining lease is inconsistent with M's public office, as his private mining interests could be furthered by the confidential data collected by or available to his office, and that, because of this possibility, the public office

¹I also assume that M's interest in no way relates to minerals in Indian lands or involves Indians, such interest being forbidden by the Secretary's letter of March 31, 1923, and by 25 U. S. C. sec. 87, respectively.

involved and the economic and statistics work of the bureau as a whole would be impaired. The obtaining of information from the mining industry is based upon confidence that this information will not be used for private purposes.

The examination of the functions of the particular office held by the official in question justifies the application of the rule to this case. His office carries the following duties:

(1) To plan, organize, and direct the collection of metal statistics with reference to output of lode and placer mines, mills, and metallurgical plants in California, Nevada, and Oregon; and to prepare reports for publication in Minerals Yearbook covering statistics as well as technical and economic developments in these States.

(2) To plan and conduct special research studies in the field of mineral economics relating to the production, movement, treatment, and marketing of ores and metals in the Pacific Coast area.

(3) To manage the field office of the Bureau at San Francisco for the purposes of maintaining first hand contact with mineral producers in the area; to perform necessary travel in connection with duties assigned; to cooperate with the Washington office in collecting data on commodities canvassed from Washington; and to have full responsibility for the administrative details of the field office.

Any person executing these duties would have at hand or could obtain any economic data of the minerals in which he was personally interested. In the case of mercury in particular, it appears that most of the information is canvassed from the Washington office. But under the duties above set forth, collection of information on minerals canvassed from Washington is to be aided by M and may be made available to him. Moreover, it does not appear that the virtues of the invention are limited to prospecting for the single metal, mercury. The fact that M voluntarily would abstain from any official connection with the mine in which he is interested, or would not utilize in connection with his private interests any confidential information which he may acquire in his public office does not cure the matter; the possibility of a conflict of interests would remain and it is that possibility which is forbidden. 40 Op. Atty. Gen. No. 42 (March 31, 1942); 40 Op. Atty. Gen. No. 47 (April 27, 1942); 40 Op. Atty. Gen. No. 48 (April 23, 1942). Accordingly I find that the principle of law announced by the Attorney General applies to this case.

While receipt of a percentage of profits from a mine may be the most satisfactory way to obtain appropriate compensation for the use of the invention, it need not be the only way. A fixed fee may be charged persons interested in obtaining mineral prospecting of their property. The amount of the fee may be made dependent upon the quantity and kind of minerals found. If, without a prospecting agreement, M and his partner discover minerals, this knowledge may

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be sold to interested persons. If M can receive compensation for the use of his prospecting invention which is not dependent on the proceeds or the production of a mine, and without his holding any interest in a mine, neither the receipt of such compensation nor the ownership of such an invention would conflict, on the facts before me, with any duties of his public office. The attribute of the invention is to discover unknown minerals. This activity is not inconsistent with the collection of economic data concerning presently known mines. Therefore, my conclusion as to the application of the Attorney General's decision is limited to M's interest in a mining enterprise or the proceeds or production therefrom.

III

May M share in the proceeds of a mining enterprise, or own and control an invention used therein, if the mining enterprise is explored or investigated by the Bureau of Mines?

Section 4 of the act of February 25, 1913 (37 Stat. 681, 30 U. S. C. sec. 6), provides:

* * * In conducting inquiries and investigations authorized by this Act neither the director nor any member of the Bureau of Mines shall have any personal or private interest in any mine or the products of any mine under investigation, or shall accept employment from any private party for services in the examination of any mine or private mineral property, or issue any report as to the valuation or the management of any mine or other private mineral property * * *

Although I have already found that existing principles of law forbid the retention by M of his interest in mining property, it is probably well also to consider the application to this case of this statutory prohibition on private mining interests.

If the Bureau of Mines undertakes any investigation of the particular mining enterprise, or indeed, conducts any economic or other inquiry concerning it, M would be required by law, if he desired to remain with the Bureau, to divest himself of any interest which he may have in that mining enterprise. The fact that he would take no part in such official investigation is irrelevant. Solicitor's Opinion M. 28087 (August 6, 1935). Although M has no interest in the lease, which is held by his associate, it is plain that he is interested in the mining enterprise to the extent of 40 percent of the proceeds thereof. His profits will vary according to, and be entirely dependent upon, the production and success of the particular mine. This is certainly a "personal or private interest in any mine or the products of any mine" which is proscribed by the statute for any member of the Bureau while the mine is under investigation by the Bureau.

The statute requires only that M divest himself of his interest in the mine and products thereof under investigation; he may continue to hold his share in the ownership and control of the invention so long as he does not receive profits therefrom dependent upon the production of the particular mine under investigation. I find nothing in the statute or in its legislative history to indicate that Congress intended to forbid the ownership of inventions, instruments or processes even though they should be used in a mine; the evil which Congress sought to stifle was that of Bureau employees holding interests in a mine or the products thereof under investigation. *Cf.* 48 Cong. Rec., part 7, p. 6985 (May 22, 1912); *ibid.*, part 8, pp. 7722-7723 (June 5, 1912), H. Rept. 243 (January 19, 1912); S. Rept. 951 (July 20, 1912); all in 62d Cong., 2d sess.; H. Rept. 1552 (February 19, 1913); 49 Cong. Rec., part 4, p. 3505 (February 20, 1913), both in 62d Cong., 3d sess. Hence I do not think that the ownership and control of an invention, under the circumstances which would here exist if M divested himself of his interest in the mercury venture and its proceeds, would be within the scope of the statute, provided, of course, that his activities in connection with the control of his invention are not such as to be incompatible with his public duties as an employee of the Bureau of Mines, as discussed above in part II.

IV

May the Director of the Bureau of Mines forbid employees of the Bureau to have any financial interest in mining ventures?

Irrespective of whether or not an employee of the Bureau of Mines would be prohibited by statute from holding any interest either in a mine or in an invention, it is clear that the conduct of his private business affairs may be restricted or otherwise affected by proper regulation. Solicitor's Opinion M. 28087 (August 6, 1935); Rev. Stat. sec. 161, 5 U. S. C. sec. 22; 40 Op. Atty. Gen. No. 47 (April 27, 1942). As Attorney General Biddle stated in the latter opinion:

* * * The head of any executive department or agency within the Government has the power to prescribe such rules and regulations governing the conduct of private business affairs by his subordinates as he may determine. See title 5, U. S. C., section 22. This power is the normal attribute of any executive charged with the responsibility of administering a public or private business through subordinates. It is an obvious and necessary complement of the right to hire and discharge. Subject to such policies as the President may from time to time prescribe, it would therefore be proper for the chief executive of any department or agency to formulate rules as broad as he deems necessary in the light of the particular ethical and administrative problems arising out of the work under his supervision.

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There is no express statutory authority for the Director to issue regulations governing the conduct of his subordinates. The Secretary of the Interior, however, as the head of a department, does have such statutory authority (5 U. S. C. sec. 22). See Solicitor's Opinion M. 31974 (November 2, 1942) [unpublished]. Furthermore the employment and discharge of all departmental employees, including those of the Bureau of Mines (see 30 U. S. C. sec. 1), is by the Secretary. Even though the Secretary may, in the absence of statutory authority, authorize his subordinates to take action and make determinations in accordance with general rules and regulations which he prescribes, it is not at all clear that the Secretary may delegate so broad a rule-making function to the Director. See 39 Op. Atty. Gen. 541 (1933); Solicitor's Opinion M. 30708 (March 4, 1941) [unpublished]; Gellhorn, *Administrative Law—Cases and Comments* 323 (1940). Consequently, any regulations concerning private activities of employees are preferably to be prescribed by the Secretary rather than by the Director.

I shall be glad to prepare a draft of regulations or order embodying the appropriate policy which the Secretary and the Director, in view of the legal conclusions herein expressed, may desire to effect.

To summarize, therefore, my conclusions are as follows:

(1) An official of the Bureau of Mines, whose invention was made prior to November 17, 1942, and outside the general scope of his governmental duties, is not required by Secretary's Order 1763 of November 17, 1942, to assign his invention to the United States and may own and control his invention, irrespective of whether its use may be in a mine which is the subject of investigation or inquiry by the Bureau of Mines.

(2) An officer of the United States may not engage in any private business activity which conflicts with the particular public office he holds. Sharing in the proceeds of a mercury or other mining lease is a private interest which conflicts with a public office the duties of which include the collection of economic and statistical information on the production, movement, treatment and marketing of ores and metals. The obtaining for the use of a mineral prospecting invention of compensation not dependent on production of a mine or an interest in a mine does not conflict with such a public office.

(3) Irrespective of any conflict of interest, a member of the Bureau of Mines is prohibited by section 4 of the act of February 25, 1913 (37 Stat. 681), from having any interest in a mine or in the proceeds of a mine concerning which the Bureau of Mines is conducting any investigation or economic or other inquiry.

(4) The private business interests of officers and employees of the Bureau of Mines may be restricted by regulations issued by the Secretary of the Interior.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

AMERICAN TRANSFORMER COMPANY

Decided March 30, 1943

CONTRACTS—DELAY—TERMINATION—LIQUIDATED DAMAGES—REMISSION UNDER FIRST WAR POWERS ACT OF 1941.

The contractor's right to continue delivery under a contract for the furnishing of transformers was terminated by the contracting officer on account of delay in making delivery and because of failure to meet contract specifications.

Held, (1) that no delay was caused by Government's failure to answer a letter, which it was under no obligation to answer, (2) that delay in delivery by the contractor's chosen supplier, in the absence of a showing that the delay was caused by the execution of defense orders which it was bound to accept and carry out prior to the execution of its contract with the contractor, was not an excusable cause of delay, (3) that the Government was entitled to liquidated damages accrued at the time of a proper termination order, (4) that the Government did not lose its right to liquidated damages after the termination order, since the contract provided for their accrual after termination, (5) that the Government lost no rights by reallocating the contract to the original contractor after termination, but during the period of suspension of the contract, delays could not be allocated or apportioned, (6) that a termination would be premature and constitute a waiver of liquidated damages if timely applications for extensions, which if granted would extend delivery date beyond termination date, were pending at the time, and (7) that while the Secretary of the Interior may remit liquidated damages, upon a showing that the war effort would be facilitated thereby, under the First War Powers Act of 1941, and Executive Orders 9001 (6 F. R. 6787), and 9055 (7 F. R. 964), promulgated thereunder, an insufficient showing of justification for the exercise of such authority has been made.

ICKES, *Secretary of the Interior*:

On April 29, 1940, the Bonneville Power Administration entered into a contract with the American Transformer Company for the furnishing of a bank of three 10,000 kva. transformers, together with certain supplies and spare parts therefor, and for the services of an erecting engineer in supervising the installation of the transformers in the Salem, Oregon, substation of the Bonneville transmission system. The contract required the delivery of the trans-

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formers and bushings f. o. b. Newark, New Jersey, of the transformer oil f. o. b. Whiting, Indiana, and of the spare parts f. o. b. Barberton, Ohio, within 150 calendar days after date of receipt of notice of award of contract. The contractor acknowledged receipt of notice of award as of April 29, 1940, thus fixing the shipping date under the contract as September 26, 1940. Shipment of all items of equipment was not completed until April 12, 1941, 198 calendar days later than the required shipping date. Certain extensions of time having been allowed by the contracting officer to the extent of 77 calendar days, the amount of liquidated damage has been fixed at \$12,100, representing 121 days' delay at \$100 per day.

The contractor requested certain extensions of time and these requests have all been considered in the findings of fact by the contracting officer dated July 21, 1942, a copy of which was forwarded to the contractor on that date. The contractor bases its request for extensions of time upon the following grounds:

(a) That the Government failed to comply with the contractor's letter of May 8, 1940, requesting a reply within ten days if the Government disagreed with points covered thereby.

(b) That the contractor was unable to secure delivery of insulating tubes required for the manufacture of the transformers because of defense orders given preference by and manufacturing difficulties encountered by General Electric Company, its chosen supplier.

(c) That the contractor was unable to secure delivery of non-magnetic steel required for the manufacture of the transformers because of an equipment failure in the plant of Jessop Steel Company, its chosen supplier.

(d) That the contractor was delayed in performance on account of defense orders accepted by it from other branches of the Government.

(e) That performance was delayed by a shortage of skilled labor.

(f) That a truck drivers' strike delayed deliveries to the contractor of material required for the manufacture of the transformers.

(g) That a notice from the contracting officer dated October 30, 1940, terminating the contractor's right to proceed, which was reiterated on November 26, 1940, and subsequently rendered void by action of the Secretary of the Interior on appeal by the contractor, delayed performance.

(h) That the contracting officer's proposal to submit a written supplemental agreement to increase the term of the contractor's guarantee from one to five years, which agreement was not submitted, delayed performance.

The contractor, being dissatisfied with the contracting officer's findings of fact, has appealed to the Secretary as provided for by the contract. In this administrative finding, the appeal of the contractor will be discussed in the order in which the requests for extensions were considered by the contracting officer.

(a) That the Government failed to comply with the contractor's letter of May 8, 1940, requesting a reply within ten days if the Government disagreed with points covered thereby.

This ground for an extension of time has been carefully and fully considered both in the contracting officer's findings of fact and in the statement in behalf of the contracting officer with respect to the contractor's appeal prepared by the General Counsel of the Bonneville Power Administration. There would appear to be no error in the finding of the contracting officer with respect to this request. The Government was under no legal duty to answer the contractor's inquiries within ten days. The contractor was not wrongfully or unreasonably delayed by the delay of the Government in answering the contractor's letter of May 8.*

(b) That the contractor was unable to secure delivery of insulating tubes required for the manufacture of the transformers because of defense orders given preference by and manufacturing difficulties encountered by General Electric Company, its chosen supplier.

Three justifications for this delay are presented by the contractor: (1) preference given to defense priority orders by the General Electric Company, (2) insufficient equipment in the General Electric Plant for the speedy manufacture of the insulating tubes, and (3) high humidity, which subjected the insulating tubes to damage and subsequent rejection. The contracting officer's findings of fact and the memorandum in support of those findings, hereinbefore referred to, have both considered and discussed in great detail this ground for an extension and it would not appear to be necessary to reiterate all of the arguments therein set forth nor to refer to the evidence as represented by the exhibits referred to. Suffice it to say that it does not appear that the contractor was delayed by any defense orders which the General Electric Company was bound to accept and carry out prior to the execution of its contract with the American Transformer Company. Admittedly, the General Electric Company did not deliver under its contract with the American Transformer Company until 34 days after its promised delivery date. This, however, is a matter between those two companies. The lack of equipment in the plant of the contractor's chosen supplier is a matter of which the contractor should have apprised itself prior to the submission of its bid. The fact that the General Electric Company was delayed on account of high humidity does not appear to come within the meaning of "unusually severe weather" as provided for in article 16 of the contract. It is not alleged that the condition was unexpected or extraordinary. In *Gleeson v. Virginia*

* According to the affidavit of Mr. Gaston, attached to the contractor's original application, the Government's answer to the May 8 inquiry, dated May 28, was received on June 4 (at p. 3).

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Midland Railroad Company, 140 U. S. 435, 35 L. ed. 458 (1891), the Court stated:

Extraordinary floods, storms of unusual violence, sudden tempests, severe frosts, great droughts, lightnings, earthquakes * * * have been held to be "acts of God"; but we know of no instance in which a rain of not unusual violence, and the probable results thereof in softening the superficial earth, have been so considered.

See also *Berg v. Erickson*, 234 Fed. 817, 824 (C. C. A. 8, 1916) and also the statement by the Comptroller General in 10 Comp. Gen. 186. I find as a matter of fact that the contractor is not entitled to an extension of time for the causes set forth in this ground of appeal.

(c) That the contractor was unable to secure delivery of non-magnetic steel required for the manufacture of the transformers because of an equipment failure in the plant of Jessop Steel Company, its chosen supplier.

No notice was given of this cause of delay by the contractor within 10 days from its beginning as required by the contract but, wholly apart from this technical failure on the part of the contractor to live up to the terms of the contract, it does not appear that the delay was one which could not have been foreseen and guarded against by the contractor in the first instance. The contractor does not seriously contend, upon appeal, that it is entitled to an extension for this cause and, in any event, I find that it is entitled to no extension because of this alleged delay.

(d) That the contractor was delayed in performance on account of defense orders accepted by it from other branches of the Government.

On August 7, 1940, the contractor addressed a letter to the Purchasing Officer, Bonneville Power Administration, Portland, Oregon, which stated in substance that on account of the preparedness program the company was encountering difficulty in production and suggested that unless it would inconvenience the Bonneville construction program the contractor would appreciate an extension of 30 days or more. It is not clear that this communication constituted an application to the contracting officer for an extension of time for performance, but if it did I am of the opinion that failure to grant such application was proper, and hereby affirm the decision of the contracting officer to that effect.

(e) That performance was delayed by a shortage of skilled labor.

The appeal on this ground is not pressed by the contractor and it is not believed that any evidence has been submitted indicating that the contractor would be entitled to relief under the terms of the contract because of this alleged cause of delay.

(f) That a truck drivers' strike delayed deliveries to the contractor of material required for the manufacture of the transformers.

The finding of the contracting officer that the contractor was entitled to an extension of 10 days because of the strike of the Newark truck drivers appears adequately to cover any delay which may have been caused because of this strike. The record does not contain evidence of any delay beyond the period allowed, and the finding of the contracting officer appears to be an adequate and proper finding.

(g) That a notice from the contracting officer dated October 30, 1940, terminating the contractor's right to proceed, which was reiterated on November 26, 1940, and subsequently rendered void by action of the Secretary of the Interior on appeal by the contractor, delayed performance.

On October 30, 1940, 34 days after the completion date provided for in the contract, and 24 days after the extended completion date (as fixed in this proceeding), the contracting officer notified the contractor that he was terminating its right to proceed under the contract and that Bonneville was recalling its inspector from the contractor's plant. After an exchange of correspondence and telegrams and after conferences with the First Assistant Secretary of the Department, the Bonneville Power Administration was directed to enter into an agreement with the contractor which provided, in substance, that if tests, which it was agreed should be made, turned out to be successful, the Bonneville Power Administration would accept the transformers and request the American Transformer Company to proceed forthwith with deliveries in accordance with the contract. This agreement was accepted in writing by the President of the American Transformer Company. Arrangements for the tests were made commencing February 4, 1941, and after some delays, occasioned by repairs and the replacement of certain parts, the transformers were accepted and ordered to be delivered by Bonneville. Delivery was completed on April 12, 1941.

The contractor contends that the termination notice of October 30, 1940,* relieved the company from any liability for liquidated damages under the contract and that the agreement of February 1, 1941, amounted to a change in the contract terms constituting a waiver of liquidated damages.

On October 30, 1940, there had accrued 24 days for which liquidated damages might be charged, i.e., 34 days had already elapsed

* This notice was given by telegram dated October 29, 1940, apparently received on October 30, 1940.

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beyond the agreed completion date, from which must be subtracted 10 days allowed on account of the teamsters' strike, making a total of 24 days' delay. There can be no doubt but that the Government is entitled, at least, to liquidated damage which had accrued as of the date of the termination order. As stated in *American Employer's Ins. Co. v. United States*, 91 Ct. Cl. 231, 239, "The liquidated-damage clause disappeared from the contract after the contract was cancelled by the Government, not before," and as pointed out in a recent decision of the Department of the Interior in the case of *Boudin Contracting Corporation*, April 25, 1942 (M. 31313), at page 8, "It seems both unreasonable and out of accord with the body of authority to hold that notwithstanding the damage which has resulted by virtue of delay the Government must, if it would relet the work under the contract, give up its accrued right to compensation for that damage."

A more serious question is presented with respect to liquidated damages for delays subsequent to October 30.

It is contended on behalf of the contractor that when its right to proceed under the contract was terminated by the Government on October 30, the Government thereby lost the right to rely upon the liquidated damage clause of the original contract for subsequent delays. In support of this view two decisions of the Court of Claims are cited. *Fidelity & Casualty Co. v. United States*, 81 Ct. Cl. 495, 502 (1935); *Commercial Casualty Co. v. United States*, 83 Ct. Cl. 367, 375 (1936). Additional authorities might be cited to the same effect. *Maryland Casualty Company v. United States*, 93 Ct. Cl. 247 (1941); *American Employer's Ins. Co. v. United States*, *supra*; 7 Dec. Comp. Gen. 409 (1928); 8 *ibid.* 266 (1928); 10 *ibid.* 437 (1931); 11 *ibid.* 83 (1931).

On the other hand, there is considerable authority for the proposition that liquidated damages may be assessed for periods subsequent to a termination notice. *Six Companies v. Joint Highway Dist. No. 13*, 110 F. (2d) 620 (C. C. A. 9, 1940); *Southern Pacific v. Globe Indemnity Co.*, 21 F. (2d) 288 (C. C. A. 2, 1927); 15 Dec. Comp. Gen. 903 (1936); 17 *ibid.* 503 (1937); 52 Harv. L. Rev. 160.

The apparent conflict in the decisions disappears when due weight is given to the language of the liquidated damage clauses in the two sets of cases, which is unfortunately often disregarded, with attendant confusion, in the opinions. In the group of cases denying recourse to liquidated damages after termination, the liquidated damage clause contains no express provision for the accrual of such damages after termination. In the group of cases allowing the collection of liquidated damages for delays after termination, the contract, in each

instance, either specifically provides that liquidated damages should be applicable to delays occurring after a justified termination notice, or contains language which the courts interpret as bearing that construction.

There is no reason why the parties to a contract should not themselves decide whether or not delays after termination should come within the scope of a liquidated damage clause. Having made their decision they must be held to it.

The basic question upon the present appeal, then, is whether the parties to the present contract have provided for the payment of liquidated damages for delays occurring after termination. That they have so provided, positively and specifically, is clear, upon examination of the clause in question, which declares:

* * * That the Government reserves the right to terminate the right of the contractor to proceed with deliveries or such part or parts thereof as to which there has been delay, and to purchase similar material or supplies in the open market or secure the manufacture and delivery thereof by contract or otherwise, charging against the contractor and his sureties any excess cost occasioned the Government thereby, together with liquidated damages accruing until such time as the Government may reasonably procure similar material or supplies elsewhere: * * *. [Article 16.]

This is the identical clause considered in the above-quoted decisions of the Comptroller General at 15 Dec. Comp. Gen. 903 and 17 Dec. Comp. Gen. 503, both holding that subsequent delays called for liquidated damages.

It follows that the termination on October 30 of the contractor's right to proceed under the original contract did not prevent the subsequent accrual of liquidated damages, if the termination was justified.

Since the contractor would have been liable for liquidated damages for normal delays in completing the contract following the reallocation of the work to a new contractor, the Government did not lose its right to liquidated damages by reallocating the work to the original contractor. A contrary rule would only penalize the Government for treating the original contractor as a part of the "open market" to which it is entitled to turn; and to avoid such penalty the Government would have to discriminate against the original contractor. The only question that arises, then, under the terms of the liquidated damage clause in the original contract is the question of how long it would have taken the Government to "reasonably procure similar material or supplies elsewhere," if it had undertaken to do so on October 30. The most convincing evidence on this issue is supplied by the facts. On February 4, the contractor resumed operations, and these operations were completed 67 days later, on April 12, 1941.

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No complaint is made that the contractor did not proceed expeditiously during this period. It is reasonable to conclude, then, that no other contractor could have completed the work more expeditiously, and this the contractor expressly alleges in his appeal.* The 67 days' delay must therefore be viewed as prima facie the measure of liquidated damages due under the contract for delays subsequent to the termination order. As for the period between October 30, 1940, when the contract was suspended, and February 4, 1941, when it was reinstated, there is no clear evidence upon which any delay can be ascribed to the contractor and I can see no justification for allocating particular days' delay to the contractor and the delays of other days to the Government, as was attempted by the contracting officer in this case. The avoidance of such conjectures as are incident to any such attempt is one of the chief objectives of liquidated damage clauses, and the courts have commonly refused to allocate or apportion responsibility for delays to which both parties have contributed. *United States v. United Engineering Co.*, 234 U. S. 236 (1914); *Standard Steel Car Co. v. United States*, 67 Ct. Cl. 445, 475-476 (1929); *Bethlehem Steel Co. v. United States*, 75 Ct. Cl. 845, 866-867 (1932).

There is, however, a possibility that the contractor may show that if it had been promptly afforded an opportunity to proceed with the contract on October 30, it might then have completed the work in less than 67 days' time. If this can be established the amount of liquidated damages would have to be reduced accordingly. The decision on this appeal will therefore afford the contractor such an opportunity for further proof.

The foregoing discussion proceeds upon the assumption that the action of the Government in ordering the contractor to cease work under the contract on October 30 was justified. The contractor strenuously contends that this is not the case. In this contention the contractor relies upon the language of Article 16 of the contract, which, so far as relevant to this issue, declares:

That the contractor shall not be charged with liquidated damages or any excess cost when the delay in delivery is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, * * * if the contractor shall notify the contracting officer in writing of the cause of any such delay, within 10 days from the beginning thereof, or within such further period as the contracting officer shall, with the approval of the head of the department or his duly authorized representative, prior to the date of final

* "The condition of the transformer industry at that time [Dec. 1, 1940] was such that it would have been impossible to have secured like transformer under a new contract within a period of six months, or before June 1, 1941, taking in account the period of time required to canvass the bids, make the award and execute the new contract." [at p. 2]

settlement of the contract, grant for the giving of such notice. The contracting officer shall then ascertain the facts and extent of the delay and extend the time for making delivery when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the facts of delay and the extension of time for making delivery shall be final and conclusive on the parties hereto.

It is contended by the contractor that on October 30 two applications for extensions of time had been submitted and that no final action had been taken thereon. Until such action had been taken, it is argued, the contractor could not know whether the original date for the completion of his contract or some extended date would govern. It is further contended that the contractor was entitled to a decision by the contracting officer and to the right of appeal to the Secretary of the Interior and that the Government violated the terms of the contract when it terminated the contractor's right to proceed thereunder before it had availed itself of the remedies which the contract allowed.

This contention would be highly persuasive if the facts were as assumed by the contractor. I think it plain that under the contractual language above cited the contractor was entitled to have proper applications for extension of time promptly disposed of. I do not think it would have been within the language or the spirit of the contract for the Government, while declining to pass upon such an application, filed in time to permit appropriate consideration, to terminate the contractor's right to proceed under the contract at a time when favorable action upon the application would have prolonged the life of the contract and precluded such termination. For clearly after termination the contracting officer has an interest in defending his action against attack, and if the grant or denial of an extension of time would have the effect of supporting or undermining his termination order he cannot occupy the disinterested judicial position which the contract clause contemplates. If, then, the Government acted prematurely and in violation of the contractor's rights when it ordered it to stop work on the contract, it would be necessary to hold that all claim to liquidated damages for delays subsequently accruing was thereby waived, no matter how clear may be the contractor's responsibility, and how remote the Government's, for such subsequent delays. *United States v. United Engineering Co.*, *supra*; *Standard Steel Car Co. v. United States*, *supra*; *Bethlehem Steel Co. v. United States*, *supra*. Indeed it may even be contended, with some show of force, that liquidated damages for delays occurring prior to October 30 would be waived by a prior failure to accord the contractor the

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rights of appeal which the contract promised, a right the existence of which might have resulted in an extension of time for performance beyond the date of the termination notice and thus invalidated the notice.

We must therefore squarely face the question of whether the contractor, as it now contends, did prior to October 30 duly apply for extensions of time which, if granted, would have carried the time for completion to a date later than October 30.

It is reasonably plain that a proper application for extension of time was made on October 2,* based upon the existence of the strike already discussed (*supra*, p. 366). While the contractor could not on October 2 have predicted the length of the strike and did not specify the number of days' extension that it sought, the fact is that the strike lasted only 20 days and that the contractor, through its president, has assumed that a delay equivalent to the duration of the strike was being sought. (See affidavit of Thomas M. Hunter, President of the American Transformer Co., dated August 19, 1942.) Thus the complete granting of this request would not have extended the time for completion of the contract beyond the critical date of October 30.

The contractor's case, then, rests on the claim that there were pending on October 30 not only the application for a 20-day extension of time based on the October strike, but also an application for a 30-day extension of time, which it claims is embodied in a letter dated August 7, 1940. This contention seems to me to be based upon a distortion of the facts. The facts are that on August 7, 1940, the contractor wrote a letter to "Department of Interior, The Bonneville Administration, Portland, Oregon, Attention: Mr. L. C. Stewart, Purchasing Officer," suggesting that "It has occurred to us that you may find it possible without inconveniencing your construction program to extend the shipping date on these transformers," and going on, further, to say, "Thirty days would help greatly and if it is possible to extend the time longer we would appreciate it." With reasonable promptitude the contractor received a negative reply from the Acting Purchasing Officer, E. J. Harr (Memorandum and Authorities in Support of Contractor's Claim, pp. 5-6). The contractor now claims that it was entitled to a decision from the contracting officer himself, and in this case the contracting officer did not affirm the action of his subordinate until about two years later, in the present proceeding. In point of fact, it is clear that the con-

* See telegram of Oct. 2, 1940, and letter of same date, from Thomas M. Hunter, President of the American Transformer Company, to Department of the Interior. These documents appear in the supplementary file furnished the Department on Feb. 18, 1943.

tractor received precisely the kind of consideration that it requested. Its letter was addressed to the purchasing officer and contained a suggestion or request which was turned down by the acting purchasing officer. If the contractor had desired a ruling from the administrator himself it could have requested such a ruling, either before or after receipt of the letter from the acting purchasing officer. If the contractor is to stand on technicalities it must show that it has itself complied with all technicalities. It cannot fairly claim that since the purchasing officer was responsible to and supervised by the administrator, a letter to a purchasing officer amounted to a notice in writing to the administrator, while at the same time contending that an answer from the purchasing officer does not represent the judgment of his superior officer. If the matter, then, is to be considered technically, we must conclude that the contractor did not conform with the technical requirements of section 16 of the contract, which specifies that the contractor seeking an extension must "notify the contracting officer in writing." If, on the other hand, we may look to the substance rather than to the form, we must conclude that the contractor, in August 1940, received exactly the kind of consideration on his request for extended time that he asked for. In neither case can it be concluded that its legal rights were violated by the Government.

I am therefore constrained to hold that the only request for an extension of time that was actually pending on October 30 was the request for 20 days' extension of time, based upon the strike to which reference has already been made, that the granting of this request would not have extended the time for completion of the contractor's work beyond October 30, and that the Government was within its legal rights in terminating the contractor's right to proceed under the contract as of October 30. If any right of the contractor has been violated it is only the contractor's right to have received prompt advice of the disposition that was to be made of his 20-day extension request. Since this right to prompt advice is entirely collateral to the main obligations of the contract (performance and payment), it cannot be said that a breach of duty by the Government in this respect will excuse the contractor's failure to complete performance as agreed. (See Williston on Contracts, sections 841-843.)

It is unnecessary to discuss in detail the contention that the Government waived its claim to liquidated damages by entering into an agreement on February 1, 1941, which reinstated the contract under certain agreed conditions. The agreement of February 1, 1941, expressly declared that upon the meeting of certain tests "Bonneville Power Administration will accept the transformers and will

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request the American Transformer Company to proceed forthwith with deliveries in accordance with the contract." This language is entirely inconsistent with a waiver of any of the provisions of the contract.

In view of the foregoing considerations, the appeal on this ground is denied, except to the extent that the entire 97 days from October 30, 1940 to February 4, 1941, when the contract was in suspense (rather than the 67 days allowed by the decision of the contracting officer), will be excluded from the period for which liquidated damages are assessed, and such further exclusions may be made from that period as may be warranted by evidence hereafter presented by the contractor as to differences in conditions between October 30, 1940, and February 4, 1941, and the effect of such differences upon the rate of performance.

(h) That the contracting officer's proposal to submit a written supplemental agreement to increase the term of the contractor's guarantee from one to five years, which agreement was not submitted, delayed performance.

No evidence having been offered in support of this ground for extension and there being no apparent reason in the record for granting one therefor, the finding of the contracting officer as to this item is affirmed.

Wholly apart from the provisions of the contract, the contractor appeals to the Secretary of the Interior to exercise the authority reposed in him by Executive Orders Nos. 9001 (6 F. R. 6787), and 9055 (7 F. R. 964), promulgated by the President pursuant to the authority granted by Congress in the First War Powers Act of 1941, to the end that the liquidated damages arising out of this contract be remitted, alleging that such action will facilitate the war program. Admittedly, upon such a showing, the Secretary has the power to take that action. Also it is obvious that the American Transformer Company is presently engaged, almost exclusively, in the manufacture and production of essential war materials. It does not appear, however, that the company's capacity so to continue would be impaired by the imposition of the liquidated damages herein contemplated, and the company only very guardedly makes such a suggestion. Without a much more impressive showing that the war effort would be facilitated thereby, I am forced to the conclusion that the remission of liquidated damages under this contract pursuant to the confidence and authority reposed in me by the President would be unwarranted. The appeal on this ground is accordingly denied.

Commencing on page 12 of the contracting officer's findings of fact under the heading "Part III—Dispute" a finding is made by the contracting officer with respect to certain charges in connection with the erection and installation of the transformers. On September 30, 1942, the General Counsel for the Bonneville Power Administration advised the Acting Director, Division of Power, Department of the Interior, that the finding as originally made by the contracting officer was in error, due to a mistake in figuring the allowance to be made with respect to the travel time required by the contractor's engineer. The corrected finding should read:

On the facts as above found and under the provisions of Article 12 of contract No. Ibp-1016, I hereby find and determine that the deduction of the sum of \$609.24, consisting of \$400.00 for services of erecting engineer and \$489.94 for labor and expense furnished by the Government in making transformer repairs, less \$180.70 round trip railroad fare and Pullman from Salem to Newark and \$100.00 travel time, saved because the erecting engineer remained in Salem to make repairs, was properly made from the amount payable to the contractor under the above numbered contract.

The contractor does not contend seriously that there is any error in this finding and there being no apparent one it is affirmed.

In summary, I find that the contractor is entitled to an extension of 107 days—10 days on account of the strike and 97 days because of the termination order. Therefore, the contractor shall be charged with 91 days' liquidated damage in the amount of \$9,100 and the balance as deducted by the contracting officer is hereby remitted.

So Ordered.

INTEREST OF GOVERNMENT IN INVENTION BY FUEL TECHNOLOGIST OF BUREAU OF MINES

Opinion, March 31, 1943

TIME OF INVENTION—PROOF OF INVENTION—SCOPE OF EMPLOYEE'S GOVERNMENTAL DUTIES—ORDER No. 1763, DATED NOVEMBER 17, 1942.

An invention not represented by a working drawing or model and not disclosed by demonstrable overt action prior to the issuance of Order No. 1763 on November 17, 1942, is subject thereto. An invention conceived during the consideration of problems connected with an employee's work, when his duties included research and investigation, is required to be assigned to the United States under the order.

GARDNER, *Solicitor*:

At the instance of the Bureau of Mines you [Secretary of the Interior] have requested my opinion concerning the relative rights of

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the United States and Vernon F. Parry, a Senior Fuel Technologist employed by the Bureau of Mines, with respect to an invention for a method of making castable beehive coke ovens.

The initial question is whether these rights are to be determined by the provisions of Departmental Order No. 1763, dated November 17, 1942, the terms of which are made "a condition of employment of all employees of the Department of the Interior and shall be effective as to all inventions made during the period of such employment after this date."

It is necessary to decide under this order when Mr. Parry's invention was made. In the "Statement Concerning Invention" filled out by him on February 26, at the request of the Bureau of Mines, Mr. Parry says that his first disclosure of his invention was to his wife on November 15, 1942, two days before the effective date of the order. No disclosure was made to others until November 20, and no sketch was made of the invention until November 24. The first written description of the invention was in Special Report C-3-47, dated December 8, 1942, and entitled "A Method for Improving Production of Metallurgical Coke." No drawing accompanied the report. At that time certain details of the process had not yet been resolved into certainty, as shown by the following statement in Mr. Parry's description of the process for manufacturing the oven:

The setting properties of refractory castable may require that the full thickness is applied, starting at the bottom of the form * * *.

As recently as February 26 the idea had not been incorporated into a physical structure, nor had any tests been made.

The only situations in which the courts have attempted to determine the exact time of an invention are in patent cases, usually interference or infringement proceedings. They are adversary proceedings, frequently brought with the intention of nullifying a patent already granted, and the evidence often relates to events that transpired years before the institution of the actions. Accordingly, the courts have laid down extremely strict standards concerning both the extent to which an invention must have been advanced before the discovery will be allowed to affect the rights of others, and concerning the nature and probative character of the evidence introduced to prove the date of an invention. Because these problems are so interrelated that they only infrequently occur separately, the decisions do not differentiate the questions as clearly as they might, but several general rules may be drawn from the opinions.

1. The courts have held that an invention is not made until it has passed beyond the stage of mental conception and imperfect experi-

ments, and is represented in some physical form. "Crude and imperfect experiments are not sufficient to confer a right to a patent, but in order to constitute an invention, the party must have proceeded so far as to have reduced his idea to practice, and embodied it in some distinct form." *Seymour v. Osborne*, 11 Wall. (78 U. S.) 516, 552 (1870). "A conception of the mind is not an invention until represented in some physical form * * *." *Clark Thread Co. v. Wilimantic Linen Co.*, 140 U. S. 481, 489 (1891).

The physical form need not be the finished product, but the minimum requirement is a working drawing or a model. In *Loom Co. v. Higgins*, 105 U. S. 580, 592 (1881), the Supreme Court stated that a claim to priority to an invention relating to machinery might be founded upon a drawing, if sufficiently plain to enable others skilled in the art to understand it.¹

2. Closely related to this substantive problem of the extent to which an invention must have been advanced before it will be recognized by the courts is the allied evidentiary problem of the requisite proof to establish this advancement. Ordinarily it is not until the invention takes some tangible form that it is susceptible of satisfactory proof. Accordingly, the courts have held that the date of an invention must be capable of proof by demonstrable overt action on the part of the inventor, such as disclosure, either orally or in writing, or the preparation of working drawings or a model.

The Supreme Court, in *Symington Co. v. National Castings Co.*, 250 U. S. 383, 386 (1919), rejected a claimed proof of invention because—

the evidence was oral. No model, drawing or kindred exhibit was produced * * *. At most [the testimony] only disclosed a mental conception in process of development which occasionally was outlined on scraps of paper and then committed to the wastebasket and was roughly worked into a wooden model four or five inches long with a penknife.

In *Deering v. Winona Harvester Works*, 155 U. S. 286, 301 (1894), the court held that testimony of prior use introduced by the wife, son, and neighbors of the inventor fell "far short of establishing an an-

¹ Although Stedman on Patents, sec. 59, page 161, makes the statement that: "an invention dates from the time the inventor completes it in his mind, although he delays for some time to bring it out," citing *O'Reilly v. Morse*, 15 How. (56 U. S.) 62, 109 (1853), and *Loom Co. v. Higgins*, *supra*, these cases do not entirely bear him out. In the *Morse* case, the court assigns the invention to the spring of 1837 though Morse had conceived the idea of the telegraph in 1832. By 1837 plans had been shown to and discussed with many persons, and the delay in making a working model even at that time was caused by the great expense involved. In the *Loom Co.* case, also, complete and detailed drawings had been made and shown to others during the period in question. To the extent that the requirement for reduction to physical form is a matter of proof rather than substance, it will be discussed below.

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ticipation with that certainty which the law requires," and in so holding stated:

Granting the witnesses to be of the highest character, and never so conscientious in their desire to tell only the truth, the possibility of their being mistaken as to the exact device used * * * [is] such as to render oral testimony peculiarly untrustworthy.

These rules, it is true, have been developed in adversary proceedings between contesting inventors. It is most doubtful, as an original proposition, that there would be any occasion for quite so rigid requirements as between the Department and its employees. Yet Order No. 1763 must be supposed to have been issued in the light of the settled rules relating to the time of invention generally, and to have adopted the ordinary criteria of the point at which an invention was "made." Any other conclusion would leave the application of the order uncertain and would cast upon the Department the unexpected duty of fashioning a novel set of rules as to the date of invention.

Applying these principles to Mr. Parry's statements concerning the time of his invention, it is entirely plain that his mental conception of a castable beehive coke oven had not been sufficiently developed prior to November 17, to have reached the point of invention under the controlling decisions. Therefore since his invention was "made" after November 17, 1942, it is subject to the provisions of Departmental Order No. 1763.

Section 2(a) of the order provides that each employee of the Department is required to assign to the United States, as represented by the Secretary of the Interior, all rights to any invention made by him within the general scope of his governmental duties. An invention is defined as within the scope of an employee's duties whenever his duties include research or investigation, or the supervision of research and investigation, and the invention arose in the course of such research or investigation and is relevant to the general field of an inquiry to which the employee was assigned.

Mr. Parry, according to his job classification as Senior Fuel Technologist, has wide latitude for independent and unreviewed action or decision in planning and carrying out difficult, important, and responsible professional work in fuel and coal research, and criticizes and supervises the preparation of reports and publications on coal and fuel technology. In his report of December 8, Mr. Parry says that the idea for the invention occurred to him during consideration of problems related to production of metallurgical coke.

Therefore, since Mr. Parry's duties include research in coal technology, and since the idea occurred to him in the course of his in-

vestigations, he is required by section 2(a) of the order to assign his invention to the United States.

Approved:

MICHAEL W. STRAUS,
First Assistant Secretary.

INCOME FROM OSAGE HEADRIGHTS

Opinion, April 1, 1943

OSAGE HEADRIGHTS — QUARTERLY PAYMENTS — TRUST FUNDS — LIFE ESTATES —
OSAGE TRIBE—ROYALTIES AND BONUSES—INTEREST—SEGREGATION—TRIBAL
FUNDS—INCOME.

1. Royalties and bonuses received from the disposition of the oil and gas underlying the Osage lands belong to the Osage Tribe.
2. The quarterly payments to owners of Osage headrights are composed of two items—(a) the pro-rata share of the balance remaining from the receipts of royalties and bonuses after deductions authorized by Congress have been made and (b) interest on trust funds to the individual credit of the owner in the Treasury of the United States.
3. Until the Secretary of the Interior has segregated amounts from the Osage tribal funds with which to pay 2(a), no part of these royalties and bonuses may be considered "income" to which the estate of a life tenant is entitled.
4. Where the segregation from the tribal fund is not made until after the death of the life tenant, her estate is not entitled to any part of the payments made after her death.
5. Where the segregation with which to make 2(a) occurs prior to the death of an Osage owner of a headright that amount shall be considered as having "accrued" within the meaning of section 4 of the act of March 2, 1929 (45 Stat. 1478). Where the segregation occurs after death the amount shall be considered as "accruing."
6. Where an Osage owner of a headright has trust funds to his individual credit in the United States Treasury at the time of his death the interest due on such funds must be computed to the date of death. That part of 2(b) representing interest on trust funds to date of death shall be considered as having "accrued" and the remainder as "accruing" within the meaning of section 4 of the act of March 2, 1929, *supra*.

GARDNER, *Solicitor*:

I am returning [to Commissioner of Indian Affairs] for further consideration the attached letter to the Superintendent of the Osage Agency relating to the estate of Frances Brunt, a white woman, who died on July 28, 1941. Frances Brunt was entitled to the income from two Osage headrights during her life under the will of her son, Joseph Brunt, deceased Osage allottee No. 1000. Leo Summers

April 1, 1948

Brunt, Theodore S. Brunt and Leonard Quinton Brunt, unallotted Osage Indians and the nephews of Joseph Brunt, are the remaindermen under his will. After the death of Frances Brunt, the quarterly payment covering these two headrights made in September 1941 was turned over to the administratrix of the estate of Frances Brunt and the attorneys for the administratrix have made demand on the Superintendent for "the balance of the income which accrued to these headrights up to July 28, 1941."

Shortly after the matter was received in this office for consideration the Superintendent was instructed to pay the March 1942 quarterly payment and all subsequent quarterly payments to the remaindermen, leaving undisposed of the question of who is entitled to receive any part of or all of the September and December 1941 payments—the administratrix of the estate of Frances Brunt or the remaindermen.

While I agree with the conclusion reached in the attached letter that the estate of Frances Brunt is not entitled to any part of either of these quarterly payments, I am of the opinion that your letter does not set out with sufficient clarity the basis for your conclusion. This is particularly true in view of the fact that this question apparently has not previously arisen in connection with Osage headrights and the further fact that the officials at the Osage Agency appear to have a misapprehension of the implications of the question presented. The decision in this case will undoubtedly be followed in other cases of a similar nature.¹

In order to determine the interest of the estate of Frances Brunt in quarterly payments made after her death it is first necessary to determine what the quarterly payments represent.

An Osage headright has been defined as the right to receive the trust funds and the mineral interests of the Osage Tribe at the end of the trust period and during that period to participate in the distribution of the bonuses and royalties arising from the mineral estate and the interest on trust funds. *Globe Indemnity Company v. Bruce, et al.*, 81 F. (2d) 143 (C. C. A. 10, 1935), *cert. den.* 297 U. S. 716.

The act of June 28, 1906 (34 Stat. 539), provided for the equal division of the lands and funds of the Osage Indians among the individual members of the tribe, according to a roll authorized to

¹ Note dispute over the interest Frances Brunt acquired in the headright of her deceased husband, Edward Brunt, Osage allottee No. 998, under his will. See also letter from the Superintendent of the Osage Agency dated November 13, 1942, relating to the will of John Thomas Baker, Osage allottee No. 915, whose widow was given the income from his headright during her lifetime.

be made by that act. After directing the manner in which the lands should be allotted, Congress reserved the oil and gas and other minerals underlying the Osage lands to the use of the Osage Tribe for a stated period, the royalties thereon to be paid to the tribe.² It further directed that all funds of the tribe should be segregated as soon as practicable after January 1, 1907, and placed to the credit of the individual members of the Osage Tribe on a basis of a pro-rata division among the members of said tribe or their heirs, said credit to draw interest, which interest was directed to be paid quarterly to the members entitled thereto.³

Congress further directed—

That the royalty received from oil, gas, coal, and other mineral leases * * * shall be placed in the Treasury of the United States to the credit of the members of the Osage Tribe of Indians as other moneys of said tribe are to be deposited under the provisions of this Act, and the same shall be distributed to the individual members of said Osage Tribe according to the roll provided for herein, in the manner and at the same time that payments are made of interest on other moneys held in trust for the Osages by the United States, except as herein provided.⁴

and that from the royalties received from oil and gas certain moneys should be set aside for agency expenses and other purposes.⁵

Section 4 of the act of March 3, 1921 (41 Stat. 1249), as amended by the acts of February 27, 1925 (43 Stat. 1008), and June 24, 1938 (52 Stat. 1034), directed the payment at the end of each fiscal quarter to each adult member of the Osage Tribe having a certificate of competency "his or her pro rata share, * * * of the interest on trust funds, the bonus received from the sale of leases, and the royalties received during the previous fiscal quarter, * * *" and to each adult member of the Osage Tribe of Indians not having a certificate of competency his or her pro-rata share of the same items, not to exceed \$1,000 per quarter.

That section also provided that at the beginning of each fiscal year there shall first be reserved and set aside out of the Osage tribal funds available for that purpose a sufficient amount of money for the expenditures authorized by Congress out of the Osage funds for that fiscal year. Section 5 of the same act, as amended by the act of April 25, 1940 (54 Stat. 168), authorizes the levy and collection

² Section 3.

³ Subsection 1 of Section 4.

⁴ Subsection 2 of Section 4.

⁵ Subsections 3 and 4 of Section 4. A similar provision for the deduction of certain sums from the amounts received as royalties is to be found in section 10 of the act of April 18, 1912 (37 Stat. 86). The act of May 25, 1918 (40 Stat. 561, 578, 579), amended the 1906 act by providing that such sums as may be annually appropriated by Congress for agency purposes shall be set aside and reserved from the royalties received from "oil, gas, or other tribal mineral rights or other tribal funds * * *."

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by the State of Oklahoma of a gross production tax upon all oil and gas produced in Osage County, Oklahoma, and authorizes the Secretary of the Interior to pay the tax on the royalty interests of the Osage Indians "from the amount received by the Osage Indians from the production of oil and gas."

The act of March 2, 1929 (45 Stat. 1478), provides that:

* * * all royalties and bonuses arising therefrom [the disposal of oil and gas and other minerals] shall belong to the Osage Tribe of Indians, and shall be disbursed to members of the Osage Tribe or their heirs or assigns as now provided by law, after reserving such amounts as are now or may hereafter be authorized by Congress for specific purposes.

This latter provision was reenacted in the act of June 24, 1938, *supra*.

The quarterly payments may thus be said to represent the pro-rata distribution of the balance of these royalties and bonuses, after the deductions therefrom authorized by Congress have been made, among the owners of headrights and the interest on the trust funds to the credit of the original members of the tribe or their heirs or devisees. Thus the quarterly payments are composed of two parts—(1) the pro-rata distribution of the balance of the royalties and bonuses and (2) the interest on the trust funds remaining to the credit of the individual members of the tribe or their successors.

I am informed that Joseph Brunt had no trust funds to his individual credit at the time of his death. Therefore, Frances Brunt's right to receive the income from the two headrights in question was confined entirely to the distribution of the royalties and bonuses arising from the mineral estate. I shall, therefore, confine myself for the present to the consideration of that part of the quarterly payment represented by the bonuses and royalties arising from the mineral estate of the tribe.

When does the individual interest in this portion of the payments arise? It has been suggested that the individual interest arises as the royalties and bonuses are received at the Osage Agency, and that the duty to segregate the funds as they are received into 2,229 shares, representing the shares of the members of the tribe enrolled in accordance with the 1906 act, and to place these segregated amounts to the credit of the individual owners of the headrights, is imposed by that part of the 1906 act set out above, which provides that the royalties "shall be placed in the Treasury of the United States to the credit of the members of the Osage Tribe." Such a construction of that provision appears to me to be strained and unwarranted, particularly in view of the fact that Congress had directed in the preceding section that the royalties should be paid to the tribe and immediately thereafter it authorized the setting aside of certain

amounts from the royalties received. In my opinion, the quoted words were used by Congress in a collective sense to designate the Osage Tribe. This opinion is strengthened by the subsequent recognition by Congress of the tribal character of these funds. The practical impossibility of placing these receipts to the credit of individuals, as and when received, is pointed out fully by the Superintendent in his letter of June 30, 1942.

The Attorney General has held that this language in the 1906 act is not to be narrowly construed to mean that these receipts are to be placed to the credit of the individual members of the tribe. In an opinion dated November 4, 1921 (33 Op. Atty. Gen. 60), discussing the constitutionality of section 5 of the act of March 3, 1921, *supra*, after pointing out that the 1906 act reserved the minerals "to the use of the tribe * * * and the royalty to be paid to said tribe," the Attorney General said:

But it must be borne in mind that the mineral rights in the lands are reserved to the tribe, not to the individual member. The tribe was the entity considered by Congress in the provision with respect to leasing for minerals and the revenues or royalties obtained were considered as tribal funds first and not as individual royalties. The mineral leases were to be made through the Tribal Council with the approval of the Secretary of the Interior; the royalties were to be paid to the Osage Tribe (section 3). The individual member had no part in the leasing even of his own land. The entire matter was a tribal affair. Until they were placed to the credit of the individual Indian, they remained tribal funds.

See also opinion of the Comptroller General dated November 27, 1928 (A-25052), that the inherited interest of a non-Indian in an Osage headright may not be paid to a receiver until the tribal funds have been segregated and the share due the non-Indian has been placed to his individual credit.

This Department has consistently held that no individual interest vests in one entitled to share in the pro-rata distribution of tribal funds until the Secretary of the Interior has segregated the pro-rata share of the individual from the tribal funds, 25 CFR 233.4. See also Cohen, *Handbook of Federal Indian Law*, 193. I find nothing in the legislation dealing with the affairs of the Osage Indians to support a deviation from the Department's position with respect to the time at which the individual's interest in the tribal fund vests. As long as these funds remain tribal funds, the owners of the headrights can claim no portion thereof as their individual funds.

The quarterly payments are made in September, December, March and June of each fiscal year. Because of the bookkeeping involved and the delay occasioned by the transfer of these funds from the Treasury of the United States to the checking account of the dis-

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bursing officer at the Osage Agency, the payment made in September represents receipts of bonuses and royalties during the previous months of April, May and June.

When the receipts for the preceding quarter are in, it is necessary that there be set aside out of these receipts an amount sufficient to pay the State tax on production and one-fourth of the amount appropriated by Congress for the fiscal year for agency expenses. It is not until it has been determined what portion of the total receipts for the preceding quarter are not needed for these purposes and are thus available for distribution to those entitled to receive them that a segregation can be made of the balance into the 2,229 shares. Schedules showing these figures are made up by the Osage Agency for Secretarial approval. The balances shown on the schedules must be checked by the Office of Indian Affairs to determine that the figures presented correspond with the figures of the Treasury Department before they can be presented to the Secretary. When these figures are presented to the Secretary they include a recommendation for the payment of so much money on each individual share. When the Secretary approves these schedules,⁶ the segregation from the tribal funds is complete and the individual owners of the headright interests may then be said to have a vested interest in the amount segregated to the extent of their individual ownership of headrights.

Frances Brunt's interest in these two headrights was that of a life tenant. During her lifetime her right to receive these quarterly payments was exactly the same as the right of an Osage owner of a headright to receive such payments. But her right to receive the income from these headrights terminated upon her death under the will of her son while the estate of a deceased Osage owner of a headright is entitled to receive subsequent payments under certain conditions by reason of an act of Congress. This latter right will be discussed later in this memorandum.

It having been established that the date of the segregation from the tribal funds of the amount necessary to make that part of each quarterly payment representing the bonuses and royalties is the date on which the funds so segregated lose their character as tribal funds and become funds to which individuals are entitled, it may now be determined whether the estate of Frances Brunt is entitled to any part of the two payments in question.

The situation here presented is not unlike that of a declaration of a cash dividend by a corporation. The determination by the Secretary

⁶ By a letter authorizing the payment of so much money per headright from the account "Proceeds of Oil and Gas Leases, Royalties, etc., Osage Reservation, Oklahoma." See letter approved May 5, 1942, I. O. file 35695-1927—Part 3.

that the condition of the tribal fund is such as to permit the payment of so much money on each headright at a future date is analogous to a resolution by the board of directors of a corporation that a cash dividend will be paid. As soon as either acts, the amount declared ceases to be the property of the tribe or the corporation and the owners of the headrights or the stockholders, as the case may be, have an individual interest in the amount declared. It is immaterial that the payment date is fixed for some time in the future. Upon the death of a person entitled to the income of shares of stock for life his executor or administrator is clearly entitled to dividends declared during his lifetime though not payable until afterwards. *Wilmington Trust Co. v. Wilmington Trust Co.*, 15 Atl. (2d) 665 (Del. 1940). A different rule prevails where the dividend is not declared until after the death of the life tenant. In such a situation the entire dividend belongs to the next beneficiary. *In re Wuichet's Estate*, 138 Ohio St. 97, 33 N. E. (2d) 15 (1941). The dividend is not apportionable between the estate of the life tenant and the remaindermen. *In re Barron's Will*, 163 Wis. 275, 155 N. W. 1087 (1916); *Mann v. Anderson*, 106 Ga. 818, 32 S. E. 870 (1899). See also Simes, *Law of Future Interests*, vol. 3, sec. 692; Bogert, *Trusts and Trustees*, vol. 4, sec. 816; Fletcher, *Cyc. Corp.* (Perm. ed.), sec. 5418.

The above rules are clearly applicable to that portion of the quarterly payments made on Osage headrights with which I am now concerned. The amounts represented by these portions of the payments are not "income" to those entitled to receive them until the Secretary of the Interior has segregated from the Osage tribal funds in the Treasury of the United States the money with which to make the payments. It is only after the funds have been individualized to the extent that it has been determined that each headright shall be entitled, at the end of the quarter, to so much money that a person, by reason of his interest in an Osage headright, may assert his claim to his proportionate share of the segregated amount.

The right of the estate of Frances Brunt to receive payments made after her death depends on whether the money representing such payments had been segregated from the tribal funds prior to her death. If the segregation represented by either of these payments had been made before July 28, 1941, the date of her death, clearly her estate would be entitled to that payment. But such is not the case. The records of the Department show that the Secretary made the segregation for the September payment on August 15, 1941, when he authorized the Superintendent to make a payment of \$280 a share at the end of the first quarter of the fiscal year 1942 (September 1941). Since Frances Brunt died prior to August 15, 1941, no income accrued to

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the headrights in which she had a life interest in the interim between the payment made in June 1941 and the date of her death.

Therefore, her estate is not entitled to retain the payment made to it in September 1941. Her administratrix should be called upon for the return of that payment. The segregation for the December 1941 payment was likewise made after her death. Her estate is, of course, not entitled to any part of that payment. The remaindermen under the will of Joseph Brunt are entitled to receive both of these payments.

The correspondence indicates the necessity for clarifying the procedure to be followed when an Osage owner of a headright dies between quarterly payment dates. The confusion appears to have arisen because of two decisions construing section 4 of the act of March 2, 1929, *supra*, and certain departmental instructions issued as the result of those decisions. Section 4 provides:

Upon the death of an Osage Indian of one-half or more Indian blood who does not have a certificate of competency, his or her moneys and funds and other property *accrued and accruing to his or her credit* and which have heretofore been subject to supervision as provided by law may be paid to the administrator or executor of the estate of such deceased Indian or direct to his heirs or devisees, or may be retained by the Secretary of the Interior in the discretion of the Secretary of the Interior, under regulations to be promulgated by him; *Provided*, That the Secretary of the Interior shall pay to administrators and executors of the estates of such deceased Osage Indians a sufficient amount of money out of such estates to pay all lawful indebtedness and costs and expenses of administration when approved by him; and, out of the shares belonging to heirs or devisees, above referred to, he shall pay the costs and expenses of such heirs or devisees, including attorney fees, when approved by him, in the determination of heirs or contest of wills. Upon the death of any Osage Indian of less than one-half of Osage Indian blood or upon the death of an Osage Indian who has a certificate of competency, his moneys and funds and other property *accrued and accruing to his credit* shall be paid and delivered to the administrator or executor of his estate to be administered upon according to the laws of the State of Oklahoma: *Provided*, That upon the settlement of such estate any funds or property subject to the control or supervision of the Secretary of the Interior on the date of the approval of this Act, which have been inherited by or devised to any adult or minor heir or devisee of one-half or more Osage Indian blood who does not have a certificate of competency, and which have been paid or delivered by the Secretary of the Interior to the administrator or executor shall be paid or delivered by such administrator or executor to the Secretary of the Interior for the benefit of such Indian and shall be subject to the supervision of the Secretary as provided by law. [Italics supplied.]

In the case of *Denoya v. Arrington*, 163 Okla. 44, 20 P. (2d) 563 (1932), the Supreme Court of Oklahoma considered a "headright" as embracing only the right to share in the distribution of the funds

received from the mineral interests of the tribe. It held that the quarterly payments accruing to the headright of an Osage allottee of less than one-half Indian blood after the quarter in which she died were not assets of the estate of the decedent which lawfully could be applied in payment of the claims of her creditors. The court said:

* * * There is a distinct difference between the income which has accrued to an Osage headright prior to the death of the allottee and that which may accrue subsequent thereto. In the instant case it does not appear to be questioned that the creditors would be entitled to have all funds of this nature and character which had accrued to the credit of said decedent at the time of her death, or accruing from such funds during the fiscal quarter of her decease, to apply to the liquidation of the debts incurred by said decedent * * *. [p. 564]

* * * * *
The aforesaid section 4 of said Act of March 2, 1929, specifically designates "his moneys and funds and other property accrued and accruing to his credit." We are of the opinion that these words "accrued and accruing" were fitly and advisedly used by Congress, and as applied to an Osage headright do not extend beyond the fiscal quarter as provided in said section 4.

In the instant case whatever moneys were due the decedent from any sources whatever at the time of her decease were those which had accrued to her as an enforceable right or claim by reason of the acts of Congress. They accrued to her credit, and the participle "accruing" is in a measure synonymous with the word "accrued." If decedent's pro rata share of the income from the mineral rights, accruing during the fiscal quarter of her decease, had not actually been placed in the Treasury of the United States to the credit of the members of the Osage Tribe of Indians and distributed to her, as provided by paragraph 2 of section 4 of the act of 1906, the same may be properly construed as coming within the provisions of said act 1929 during such quarter as "accrued and accruing," as such income derived from said headright came into existence prior to her death and became vested in her as an enforceable right, although it actually had not and could not have been placed to her credit prior to the expiration of such fiscal quarter. * * * [p. 567]

Shortly after that decision the following instructions, contained in a letter dated August 1, 1933, approved by the Department on August 17, 1933, were issued covering the disbursement of funds to executors and administrators of the estates of Indians of less than one-half Indian blood or Indians having certificates of competency:

We are of the opinion that under the decision in the *Denoya* case only such funds can be paid the personal representative as accrued prior to his death. Therefore, in the example given where the Indian died May 15 the administrator or executor should receive the June payment in full and the proportionate part of the September payment that accrued up to May 15.

You are authorized to make disbursement to executors and administrators of estates of deceased Osage Indians of less than one-half Indian blood or who have certificates of competency in accordance with the above.

Two years thereafter, the Circuit Court of Appeals handed down its decision in *Globe Indemnity Company v. Bruce, et al., supra*, dis-

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agreeing in part with the State court's holding in the *Denoya* case. The court included within its definition of a "headright" the right to receive the trust funds segregated as the result of the 1906 act at the end of the trust period and, during the trust period, to participate in the distribution of the interest on such trust funds. There the question was whether the County Court had jurisdiction over a headright owned by a deceased Osage of less than one-half degree Indian blood who had received a certificate of competency and the accumulations thereto during the period of administration or whether the County Court's jurisdiction extended to only so much of the headright and accumulations as is necessary to pay legacies and certain debts. The Court held that the headright of a deceased Osage is subject to the jurisdiction of the County Court and that the quarterly payments are subject to the jurisdiction of such court during the pendency of the administration and until the settlement of the estate. In reviewing the *Denoya* decision the court said:

It further held that the word "accruing" in section 4, *supra*, embraces only the quarterly payment for the quarter in which the decedent dies.

With the latter holding we do not agree.

* * * * *

It will be observed the act speaks of moneys, funds and property accrued and accruing to the credit of the owner of the headright, not of quarterly payments accrued or accruing to such owner. We see no reason for construing the words accrued and accruing as referable to quarterly payments.

Interest on trust funds and the mineral royalties are constantly accruing to the credit of owners of headrights. On the death of the owner of a headright, certain interest on trust funds and mineral royalties will have accrued to his credit. The word accruing cannot refer to them. It must refer to those that arise after the death of the owner of the headright. We hold the word "accrued" refers to interest and royalties *that have arisen to the credit of the owner of the headright* at the time of his death and the word "accruing" refers to the interest and royalties *that will arise to the credit of his headright* after his death and prior to the distribution of his estate. [p. 153] [Italics supplied.]

The Federal court held further that the administrator of the deceased Indian's estate was authorized to receive the quarterly payments which accrued after her death to pay the costs of administration, to discharge any valid debts to the payment of which the quarterly payments could lawfully be applied, and to distribute the balance in accordance with the provisions of decedent's will. It held that expenses of the last illness, funeral expenses and legacies under the will could be paid out of quarterly payments accruing after the death of the owner but expressed no opinion on the question of whether the quarterly payments accruing after the death of the owner

could be resorted to for the discharge of the claims of general creditors.

As the result of the *Globe Indemnity Company* decision, further instructions were issued in a letter dated March 31, 1936, and approved by the Department on April 6, 1936, covering payments to be made to executors and administrators after the death of an Osage Indian. After stating that under section 4 of the 1929 act the Osages fell into two classes—Class A, composed of those of one-half or more Indian blood who do not have certificates of competency, and Class B, composed of those of less than one-half Osage Indian blood and those Osage Indians (even of one-half or more Indian blood) who have received certificates of competency, the Assistant Commissioner said:

As to decedents in this class (Class A) therefore, no funds accruing after the death of the Indian should be turned over to the executor or administrator except for the payment of approved claims, costs, and expenses, in accordance with specific authority from this Department.

As to the Indians in Class B, *supra*, the funds in such estates should be paid to the executors or administrators as they accrue. In the event, however, any executor or administrator attempts to use these funds for purposes other than the payment of last illness, funeral expenses, expenses of administration and legacies under duly probated wills, if any, of such decedents, appropriate action can and should be taken to recover such funds for the benefit of the estate of the decedent.

The practical effect, therefore, of the decision of the Circuit Court of Appeals in the *Bruce v. Globe Indemnity* case, *supra*,—which has now become final,—is that the word "accruing" as used in Section 4 of the Act of March 2, 1929, is interpreted as referring to payments arising after the death of the owner of the headright. Regardless, therefore, of whether the funds accrued before or after the death of such an Indian such funds of estates in Class A are available for payment to executors or administrators for the purpose of settling lawful indebtedness, costs, and expenses, when approved by the Secretary of the Interior, and in Class B for payment to executors or administrators during the pendency of administration of the estate.

It was also pointed out that since the United States Supreme Court had denied certiorari in the *Globe Indemnity Company* case, the Department would not be justified in pursuing any course other than to follow the decision of the Federal court. While not specifically overruling its previous instructions approved on August 17, 1933, such was the effect of these instructions.

Approval of these instructions was given with the understanding that the instructions had no application to tribal trust funds segregated and placed to the credit of individual Osage members under the act of June 28, 1906, *supra*. Thereafter my predecessor, on April 26, 1936, held that in the absence of legislation by Congress providing for payment of the segregated trust funds of deceased Osage Indians

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to executors or administrators of their estates, such payments were not authorized, whether the deceased member did or did not have a certificate of competency at the time of his death. He held further that the authority contained in the 1929 act for payment to executors and administrators did not extend to the segregated trust funds but that it was confined to those funds which had accrued or which might accrue from the interest on the segregated trust funds and from the mineral royalties and bonuses (55 I. D. 489). I am thoroughly in accord with that opinion.

Sometime thereafter the Superintendent initiated the practice of sending a form letter to executors and administrators of estates of deceased Osages. That letter refers to the holdings in the *Denoya* and *Globe Company* cases and the departmental instructions. It concludes:

For the reason that funds are not paid out to Osage Indians in the same quarter in which they accrue, as a rule the first quarterly payment check after death and a portion of the second quarterly payment check after death, depending on the date of death, are for funds which accrued prior to death. At the time such checks are sent to you we will inform you of the portion thereof which accrued prior to date of death.

I am informed that the Superintendent relies on the instructions issued in 1933 for this paragraph. Those instructions, as stated above, should no longer be followed.

Because the funds which have accrued prior to the death of an Osage owner of a headright are available for different purposes than those which accrue subsequent to death, it is important that the Superintendent understand thoroughly what funds are considered to have accrued at the date of death.

I have already shown that the quarterly payments are composed of two parts and that, as to the first part, when the owner of a headright dies between quarterly payment dates, whether or not any part of subsequent quarterly payments arising from the segregation of the royalties and bonuses may be said to have accrued to his credit depends upon the date of the segregation of these funds by the Secretary. If the funds are segregated before the death of the owner, they have accrued to his credit and it is immaterial that they will not be placed to his account at the agency until the end of the quarter. If the funds are segregated after the death of the owner they must be considered as "accruing" within the meaning of the 1929 act.

A different rule must prevail, however, as to the other part of the quarterly payments made after the death of the owner of a headright where such owner has to his credit funds segregated as the result of the 1906 act. The interest payable on these funds makes up the other

part of the quarterly payment. The owner's beneficial interest in these funds had vested prior to his death and, since interest accrues from day to day,⁷ that part of the quarterly payment made next after death, representing the interest on these funds, should be divided in the ratio of the length of time the Osage owner of the funds was alive to the entire period covered by the payment. When this division has been made the interest up to the date of death must be considered as "accrued" and the balance of the interest must be considered as "accruing." In other words, the interest should be computed to date of death.

I am of the opinion that the statement contained in the instructions issued in 1936 that the word "accruing" as used in section 4 of the act of March 2, 1929, refers to payments arising after the death of the owner of the headright is incorrect. No general statement can be made that payments made after death shall be considered as "accruing." The date of death of the owner in relation to the date of segregation of the receipts from the mineral interests and whether or not the owner had trust funds to his credit must be taken into consideration in each instance before it can be determined whether or not any part or all of payments made subsequent to death shall be considered as "accruing" within the meaning of the 1929 act.

The instructions approved on April 6, 1936, should be modified to conform with this memorandum.

Approved:

OSCAR L. CHAPMAN,

Assistant Secretary.

APPLICABILITY OF THE HATCH ACT TO OFFICERS AND EMPLOYEES OF THE TERRITORY OF HAWAII

Opinion, April 3, 1943

FEDERAL EMPLOYEES—ADMINISTRATIVE POSITIONS—GOVERNOR AND SECRETARY OF
TERRITORY—POLITICAL ACTIVITY—SECTION 2 OF HATCH ACT.

Since the Governor and the Secretary of the Territory of Hawaii are appointed by the President, by and with the advice and consent of the Senate, and since their salaries are paid from the Federal Treasury, they must be regarded as employed in "administrative" positions "by the United States" and hence subject to the prohibition in section 2 of the Hatch

⁷ *Wilmington Trust Co. v. Chapman*, 20 Del. Ch. 67, 171 Atl. 222 (1934), affirmed on appeal; *Massey v. Wilmington Trust Co.*, 20 Del. Ch. 454, 180 Atl. 927; *Kahn v. Wells Fargo Bank & Union Trust Co.*, 27 P. (2d) 672 (Calif. 1933); *In re Davidson's Estate*, 287 Pa. 354, 135 Atl. 130 (1926); *Equitable Trust Co. v. Miller*, 189 N. Y. Supp. 293 (1921); *Bridgeport Trust Co. v. Marsh*, 87 Conn. 384, 87 Atl. 865 (1913).

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Act against the use of "official authority for the purpose of interfering with, or affecting, the election or the nomination of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, or Delegate or Resident Commissioner from any Territory or insular possession."

FEDERAL EMPLOYEES—EXECUTIVE BRANCH—GOVERNOR AND SECRETARY OF TERRITORY—POLITICAL ACTIVITY—SECTION 9(a) OF HATCH ACT.

The Governor and the Secretary of the Territory of Hawaii, while employed in the executive branch, are not to be regarded as employed in the executive branch of the *Federal* Government, within the meaning of section 9(a) of the Hatch Act, forbidding officers and employees thereof to use "official authority or influence for the purpose of interfering with an election or affecting the result thereof," or to take "any active part in political management or in political campaigns," since (1) the context of the entire section reflects an intention to exclude policy-making positions, and (2) reference to subsequent enactments indicates a legislative recognition that Territorial officers theretofore had been unaffected by the act.

TERRITORIAL EMPLOYEES—DIRECTOR OF TERRITORIAL SOCIAL SECURITY DEPARTMENT—POLITICAL ACTIVITY—SECTIONS 2 AND 12(A) OF HATCH ACT.

The Director of the Territorial Social Security Department, by reason of his identity with the program of the Federal Social Security Act, and the definition of "State" to include "Territory" in section 19 of the Hatch Act, is subject to all of the prohibitions in sections 2 and 12(a) of the act against political activities on the part of officers and employees "of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency."

TERRITORIAL EMPLOYEES GENERALLY—POLITICAL ACTIVITY—HATCH ACT.

No officers or employees of the Territory of Hawaii, other than the Governor, the Secretary, and the Director of the Territorial Social Security Department, are subject to any of the provisions of the Hatch Act unless shown to be employed in connection with a federally financed activity.

GARDNER, *Solicitor*:

At the request of the Acting Director of the Division of Territories and Island Possessions, the following questions submitted by the Governor of Hawaii, concerning the application of the Hatch Act¹ to officers and employees of the Territory, have been submitted to this office for opinion:

[1] Are the provisions of Section 9 of said law applicable to Territorial officers and employees? In other words, are Territorial officers "Federal" officers or officers of any agency of the Federal government in contemplation of this law? [2] If this should be answered in the negative, would these provisions apply to Territorial officers who are appointed by the President and whose

¹ Act of August 2, 1939 (53 Stat. 1147), as amended by the acts of July 19, 1940 (54 Stat. 767), and March 27, 1942 (56 Stat. 176, 181, 18 U. S. C. secs. 61 *et seq.*).

salaries are paid from Federal funds, such as the Governor and the Secretary of the Territory? [3] Do these provisions apply to Territorial officers appointed locally, whose salaries are paid in part from Federal funds, such, for instance, as the Director of the Territorial Social Security Department?

While categorical answers to these questions do not completely clarify the situations to which they are addressed, it may be said in a general way at the outset that none of the officers or employees of the Territory, except the Director of the Territorial Social Security Department, appears to be subject to the act's principal restrictions on political activity. These conclusions will be amplified in the discussion to follow.

In so far as the act undertakes to define the scope of permissible political activity by persons identified with the territorial governments, its provisions are both literally and historically productive of some confusion.

Section 9 provides:

(a) It shall be unlawful for any person employed in the executive branch of the Federal Government, or any agency or department thereof, to use his official authority or influence for the purpose of interfering with an election or affecting the result thereof. No officer or employee in the executive branch of the Federal Government, or any agency or department thereof, except a part-time officer or part-time employee without compensation or with nominal compensation serving in connection with the existing war effort, other than in any capacity relating to the procurement or manufacture of war material, shall take any active part in political management or in political campaigns. All such persons shall retain the right to vote as they may choose and to express their opinions on all political subjects and candidates. For the purposes of this section the term "officer" or "employee" shall not be construed to include (1) the President and Vice President of the United States; (2) persons whose compensation is paid from the appropriation for the office of the President; (3) heads and assistant heads of executive departments; (4) officers who are appointed by the President, by and with the advice and consent of the Senate, and who determine policies to be pursued by the United States in its relations with foreign powers or in the Nation-wide administration of Federal laws.²

(b) Any person violating the provisions of this section shall be immediately removed from the position or office held by him, and thereafter no part of the funds appropriated by any Act of Congress for such position or office shall be used to pay the compensation of such person.

Both the Governor and the Secretary of the Territory of Hawaii are appointed by the President, by and with the advice and consent of the Senate,³ and their salaries consistently have been paid from

² The exception in the second sentence was added by section 701 of the Second War Powers Act, 1942 (act of March 27, 1942, 56 Stat. 176, 181), but this amendment is not material in the analysis, *infra*, of the relation between sections 9(a) and 12(a).

³ Sections 66 and 69 of the Organic Act of Hawaii (act of April 30, 1900, 31 Stat. 154, 48 U. S. C. secs. 531 and 534).

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the Federal Treasury.⁴ While they of course are employed in the executive branch, the question remains whether their employment is in the executive branch of the Federal, as distinguished from the Territorial, Government. If so, they are within the category forbidden by the first sentence to use their "official authority or influence for the purpose of interfering with an election or affecting the result thereof," and also are within the prohibition in the second sentence, against taking "active part in political management or in political campaigns," unless they should be regarded further as within one of the four classes of persons expressly excepted from the operation of the sentence. If they are not employed in the executive branch of the Federal Government, section 9 of course is without application to them in any respect.

The words in which the persons to whom section 9(a) shall apply are not free from ambiguity, but I am disposed to resolve that ambiguity in favor of the exclusion of the Governor and the Secretary for two reasons. First, a reading of the whole section 9(a) in the light of the available legislative history, although the latter admittedly is meager, negatives any suggestion that the Congress had Territorial officers in mind for any purpose at the time of the enactment of the original Hatch Act.⁵ It is clear that the second sentence of section 9(a) was not intended to apply to what may be broadly described as policy-making positions,⁶ as enumerated in the four classes of exceptions. It seems next to inconceivable that the Congress could have intended that the incumbents of offices invested with the dignity of that of the Governor⁷ and the Secretary⁸ should

⁴ See, e.g., Interior Department Appropriation Act, 1943 (act of July 2, 1942, 56 Stat. 506, 559).

⁵ Sections 12-20, inclusive, were added by the act of July 19, 1940 (54 Stat. 767, 18 U. S. C. secs. 617-611t), which also amended section 2 to extend its prohibitions to administrative employees of the States in connection with federally financed activities.

⁶ See statements of Senator Hatch in debate on proposed repeal of section 9 in 86 Cong. Rec. 2432 (1940). See also section 14 of the act, expressly excepting the Commissioners and the Recorder of Deeds of the District of Columbia from the prohibition in section 9(a) against political activity.

⁷ Section 67 of the Organic Act (note 3, *supra*; 48 U. S. C. sec. 532) provides: "That the governor shall be responsible for the faithful execution of the laws of the United States and of the Territory of Hawaii within the said Territory, and whenever it becomes necessary he may call upon the commanders of the military and naval forces of the United States in the Territory of Hawaii, or summon the posse comitatus, or call out the militia of the Territory to prevent or suppress lawless violence, invasion, insurrection, or rebellion in said Territory, and he may, in case of rebellion or invasion, or imminent danger thereof, when the public safety requires it, suspend the privilege of the writ of habeas corpus, or place the Territory, or any part thereof, under martial law until communication can be had with the President and his decision thereon made known."

⁸ Section 69 of the Organic Act (note 3, *supra*) requires the Secretary to record and preserve all laws and proceedings of the legislature and all acts and proceedings of the Governor, to promulgate proclamations of the Governor, and to transmit copies of proceedings and reports to the President and the Senate and the House of Representatives

not be excepted, and yet class (4), which is the only one in which it would be even remotely possible to place these officers, is couched in language manifestly reflecting a thought extending only to such officers as ambassadors⁹ and policy-making officials of the national government, who determine policies to be pursued in the *Nation-wide* administration of Federal laws.

Secondly, it is settled that in ascertaining the legislative intention in a particular act reference may be had to subsequent legislation on the same subject,¹⁰ and reference to sections 12(a) and 19 of the Hatch Act, which were added in 1940,¹¹ indicates a recognition by the Congress that Territorial officers theretofore had been unaffected by the act. Section 12(a) forbids the same political activities as are named in section 9(a), on the part of officers and employees "of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency," and section 19 defines "State" as "any State, Territory, or possession of the United States." Section 12(a), however, specifically excepts "the Governor or the Lieutenant Governor of any State or any person who is authorized by law to act as Governor" from the prohibition against taking "active part in political management or in political campaigns." While the factual circumstances in which section 12(a) may be operative are more restricted than those in which section 9(a) applies, the exclusion of the Governor and the Secretary (who is "authorized by law to act as Governor") from this particular prohibition can be consistent only with an assumption that section 9(a), which includes the same prohibition, had no application to them in the first instance.

While it is my opinion that the Governor and the Secretary thus are not employed in the executive branch of the *Federal* Government, and hence are not subject to section 9 of the Hatch Act in any respect, it should be noted that they probably nevertheless must be regarded as employed in "administrative" positions "by the United States," in view of the manner of their appointments and the source of their

of the United States. Section 70 provides that the Secretary shall act as governor in case of the latter's death, removal, resignation, disability, or his absence from the Territory.

⁹ The Attorney General has held that ambassadors and ministers are within class (4) of the exceptions in section 9(a). 39 Op. Att. Gen. 508 (1940).

¹⁰ *United States v. Freeman*, 3 How. 556, 564, 565 (1845); *Tiger v. Western Investment Co.*, 221 U. S. 286, 309 (1911); *United States v. Hutcheson*, 312 U. S. 219, 231 (1941); *United States v. Cooper Corporation*, 312 U. S. 600, 608, 609 (1941); *Great Northern Ry. Co. v. United States*, 315 U. S. 282, 276 (1942). See *Cope v. Cope*, 137 U. S. 682, 689 (1891).

¹¹ Note 5, *supra*.

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salaries,¹² and hence within the category of persons forbidden by section 2 of the act to use "official authority for the purpose of interfering with, or affecting, the election or the nomination of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, or Delegate or Resident Commissioner from any Territory or insular possession."¹³

It therefore is my opinion that the Governor and the Secretary of the Territory, while forbidden in common with all other administrative employees of the United States to use official authority or influence for the purpose of interfering with or affecting the election or nomination of any candidate for any of the offices enumerated in section 2 of the Hatch Act, are at liberty to take an active part in political management and political campaigns.

As for other Territorial officers and employees, section 80 of the Organic Act¹⁴ provides that certain enumerated officers shall be appointed by the Governor, by and with the advice and consent of the senate of the Territory, that "the manner of appointment and removal and the tenure of all other officers shall be as provided by law," and that "the salaries of all officers other than those appointed by the President shall be as provided by the legislature." Appropriations for the salaries of such officers and employees are made by the Territorial legislature.¹⁵ While the direct question has not been one of frequent presentation, the holdings have been uniform in their indication that a Territorial officer or employee is not a Federal officer or employee. *Snow v. United States*, 18 Wall. 317 (1873); *Schuerman v. Arizona*, 184 U. S. 342, 353 (1902); *Ex parte Duncan*, 1 Utah 81 (1873); 29 Op. Atty. Gen. 410, 412, 413 (1912); 11 Comp. Dec. 702 (1905). See also 12 Comp. Gen. 600 (1933); *ibid.* 651 (1933); 15 *id.* 852 (1936); 16 *id.* 49 (1936); 17 *id.* 362, 365 (1937). It accordingly is my opinion that persons appointed in the manner prescribed by section 80 of the Organic Act are neither "employed in any administrative position by the United States," within the meaning of section 2 of the Hatch Act, nor "employed in

¹² Notes 3 and 4, *supra*.

¹³ A violation of section 2 is punishable, under section 8, by a fine of not more than \$1,000 or imprisonment for not more than one year, or both. Section 9, however, is not a penal provision. While it is not important to the questions presented in this opinion it should be noted that section 2 applies to all persons employed in administrative positions, irrespective of the branch of the Federal Government, whereas section 9 is confined to employees of the executive branch. See Department of Justice Circular No. 3285, issued August 10, 1939.

¹⁴ Note 3, *supra*; 48 U. S. C. sec. 546.

¹⁵ See, e.g., Session Laws of Hawaii, 1939, Chap. 267B, which made general appropriations for the biennial period ended June 30, 1941.

the executive branch of the Federal Government," within the meaning of section 9(a), and hence that they are not subject to the prohibitions against political activity imposed on those classes of persons.

The question remains, however, whether clause (2) of section 2¹⁶ and section 12(a) may be applicable to any of the Territorial officers or employees, in view of section 19, which defines "State" to include "Territory." The Director of the Territorial Social Security Department, "who shall be appointed in the manner prescribed by * * * section 80 of the Organic Act"¹⁷ clearly seems to be an officer whose political activities are proscribed by these provisions, by reason of his identity with the program of the Federal Social Security Act,¹⁸ which extends to Hawaii,¹⁹ and which has been comprehensively implemented by local legislation.²⁰ I therefore conclude that this officer is "employed in [an] administrative position by [a] State * * * in connection with [an] activity which is financed in whole or in part by loans or grants made by the United States," that this is his "principal employment," and that he therefore is subject to all of the prohibitions in sections 2 and 12(a) of the Hatch Act.

Whether there may be other Territorial officers or employees to whom sections 2 and 12(a) apply is not definitely disclosed by the file submitted. It can only be observed that none of such persons is subject to the provisions of these sections unless his situation is similar to that of the Director of the Territorial Social Security Department in that his employment is in connection with a federally financed activity, a question which may be determined, if necessary, upon the showing of complete facts in particular instances.²¹

In summary, it is my opinion that—

(1) The Governor and the Secretary of the Territory of Hawaii each is employed in an "administrative position by the United States," and both therefore are subject to the prohibition in section 2 of the Hatch Act against the use of official authority or influence for the purpose of interfering with or affecting certain nominations and elections;

¹⁶ See notes 5 and 13, *supra*.

¹⁷ Session Laws of Hawaii, 1939, Chap. 259A, sec. 1.

¹⁸ Act of August 14, 1935 (49 Stat. 635, 42 U. S. C. secs. 301 *et seq.*).

¹⁹ *Ibid.*, sec. 1301(a).

²⁰ Session Laws of Hawaii, 1939, Chap. 259A.

²¹ "Under the language of the statute, the determination of persons or classes of persons subject to its provisions will turn, in a great many instances, on the facts in the particular cases. A complete classification of State or local officers or employees within the scope of the statute is, of course, impossible." (Paragraph 5, Civil Service Commission Form 1236A, issued September 13, 1940.) See also Starr, "The Hatch Act—An Interpretation," 30 National Municipal Review, 418, 423 (1941).

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(2) The Governor and the Secretary are not employed "in the executive branch of the Federal Government," and therefore are subject to none of the provisions of section 9;

(3) The Director of the Territorial Social Security Department, by reason of his connection with a federally financed activity, is subject to all of the prohibitions in sections 2 and 12(a);

(4) None of the remaining Territorial officers and employees, unless shown to be employed in connection with a federally financed activity, is subject to any of the provisions of the Hatch Act.

Approved:

ABE FORTAS,

Under Secretary.

LIABILITY OF GOVERNMENT FOR DAMAGE CAUSED BY UNPRECEDENTED FLOODS

Opinion, April 5, 1943

CLAIMS AGAINST UNITED STATES—PROPERTY DAMAGE—FLOODING—MEASURE OF LIABILITY.

Liability of the Government for damage to privately owned property flooded by its irrigation works is not that of an insurer but is to be determined according to the degree of care required of ordinarily prudent and careful private individuals in like circumstances.

CLAIMS AGAINST UNITED STATES—PROPERTY DAMAGE—FLOODING—NEGLIGENCE— ACT OF GOD.

Claims for damage resulting from a flood of such unprecedented volume as to constitute it an act of God, for which the Government is not liable, cannot successfully be asserted on the ground of negligence in failure to construct a detention reservoir of sufficient volume to impound unprecedented and unforeseeable flood waters.

GARDNER, *Solicitor.*

Certain Indians of the Yuma Indian Reservation, through the Bureau of Indian Affairs, have filed claims totaling \$4,615.25 against the United States for compensation for damage to their allotments resulting from flooding alleged to have been caused by breaks which occurred in the banks of the Yuma Main Canal and the Detention Reservoir on September 5, 1939. The claims represent only the portion of the damage suffered by Indians on the Reservation Division of the project, which is on the California side of the Colorado River. The total damage resulting from the flood, including that suffered by white occupants of the Bard Irrigation District, which is on the Arizona side of the River, is estimated at \$25,000. The question

whether the claims submitted in behalf of the Indians either should be paid under the provisions of the Interior Department Appropriation Act, 1943 (56 Stat. 506), relative to compensation for damages caused by irrigation works, or should be allowed and certified to the Congress under the act of December 28, 1922 (42 Stat. 1066, 31 U. S. C. sec. 215), has been submitted to me for opinion.

It is my opinion that the Department is without authority to give favorable consideration to the claims under either of these acts.

The property of the claimants is within that part of the Reservation Division of the Yuma Irrigation Project lying in Imperial County, in the southeastern corner of California. The area, which is generally known as the Salton Sea region, is physiographically unique in many respects. (See Appendix II.)* Because of this fact unexpected torrential rains and "flash" floods are not uncommon to the region. (See Appendix III.)

The Yuma Canal skirts the foot of the bench or mesa between the Cargo Muchacho Mountain Range and the lowlands bordering the Colorado River. Picacho, Unnamed, and Bee Washes are prominent among many washes which drain the high mesa lands. The Yuma Canal crosses Unnamed Wash by contour location on the alluvial fan some distance below the wash outlet. The All-American Canal, located approximately 22 feet higher than the Yuma Canal, crosses the wash near its outlet.

I

The evidence upon the basis of which the claims must be determined is contained in statements from representatives of the Bureau of Reclamation, the Yuma County Water Users Association, and the Bureau of Indian Affairs. (See Appendix I.) The following factual circumstances appear to be uncontroverted:

On September 4, 5, and 6, 1939, a rainstorm of unprecedented proportions (hereinafter referred to as the 1939 flood) visited the area of the Yuma Irrigation Project. The storm was admittedly much worse than previous storms which had visited the same area in 1926, 1932, and 1937. At the time of the construction of the Yuma Detention Canal rainstorms of floodlike proportion were known to the area. In 1925, in recognition of this fact, the Bureau of Reclamation constructed certain protective works, including conduits to carry the flood waters from Picacho and Unnamed Washes across the Yuma Main Canal into the Detention Reservoir, located at the outlet of the washes. It appears that no definite information was

* Appendices referred to in this opinion may be found in the files of the Solicitor's Office. [Editor]

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available as to the run-off of the washes but that the reservoir was constructed in accordance with the best engineering practices and on the basis of the best available information with a capacity when full of approximately 1,500 acre-feet. The construction of the reservoir is stated by the Bureau of Reclamation not to have been for the purpose of storing water permanently, but for the temporary detention and later orderly discharge, through appurtenant drainage works, of flood waters from the washes mentioned. (See Appendix III.) It is asserted that these flood waters would otherwise cause damage to the project main canal and surrounding territory with a resultant interruption in water service to many thousands of acres of land.

As a result of a flood in 1926, the capacity of the reservoir was increased approximately 25 percent by constructing the embankments two feet higher. A concrete diaphragm 11½ inches thick also was built throughout the full height of the fill, and extending 4 to 5 feet vertically into the natural ground, as an additional precaution against rodents. (See Appendix III.) The reservoir failed, after what is reported to have been an extraordinary rainstorm, on October 10, 1932, because of gopher holes which developed at its outside toe, despite the diaphragm precaution, almost at the same time that the force of the rainstorm struck. In connection with that incident, the District Counsel of the Bureau of Reclamation stated that the Picacho and Unnamed Washes flooded approximately the same area prior to their control by the Detention Reservoir, that the building of the control works had little or no effect upon the course flood waters would take if the works failed, other than a benefit to some lands and little, if any, detriment to others, and therefore took the position that since the location of the washes was an act of nature, and rainstorms were the result of an atmospheric disturbance, both beyond the control of the Bureau of Reclamation, the Bureau should not be held responsible for damage resulting therefrom. This position was affirmed in an opinion of the Acting Solicitor, approved February 20, 1939 (M. 30038), rejecting claims for damages which were filed as the result of a flood in 1937 (see Appendix III), wherein it was concluded that the irrigation work "did not increase the burden on claimants' lands because such work captured a part of the flood waters and decreased the damages that the claimants might have sustained."

With regard to the 1939 flood, the evidence submitted with the present claims discloses that according to reports from the United States Weather Bureau at Yuma, Arizona, a total precipitation of 4.45 inches occurred during the 3-day period of the storm, 2.17 inches

falling during a 1½-hour period on September 4. Water was discharged from all of a number of washes of varying sizes, but mainly from the Picacho, the Unnamed, and the Bee Washes. These waters converged upon the All-American Canal and the Yuma Main Canal and Detention Reservoir, as a result of which a break occurred in the All-American Canal in the Bee Wash area, numerous breaks occurred in the banks of the Yuma Main Canal, a break occurred in the bank and numerous breaks occurred in the dikes of the Detention Reservoir. It appears from the reports and maps submitted that Bee Wash, which is to the southwest and below Picacho and Unnamed Washes, broke through the banks of the All-American Canal and carried considerable debris, consisting mainly of sand and gravel, into the Yuma Main Canal, damming it completely and causing it to break its banks at a point 1,000 feet upstream in the NW¼NE¼ sec. 11, T. 16 S., R. 22 E. The main break was 118 feet wide and 22 feet deep. It is reported that there were breaks near Station 220, in the SW¼ sec. 28, at Station 297, in the NW¼ sec. 32, all above Unnamed Wash, numerous additional small breaks and a larger break in the canal's banks just above the Detention Reservoir, and a break in the bank of the Detention Reservoir in the S½S½ sec. 31, all in T. 15 S., R. 23 E., and within the drainage area of that wash. It also is reported that a large part of the water which flooded the project lands originated in the Picacho Wash watershed, but that very little water flowed into the project canal from this source since the main canal siphon (flood overshoot) apparently carried the flood flow into the Detention Reservoir. The latter action resulted in almost complete destruction of the reservoir dikes which failed at eight points shortly after being overtopped for a distance of nearly a half mile. A part of the water from the Unnamed Wash also entered the Detention Reservoir. The greater portion of the flow, however, after destroying training dykes adjacent to the siphon structure over the Yuma Main Canal appears to have entered the canal, destroying both banks above the structure. The Main Canal was overtopped between the Picacho Wash and Unnamed Wash siphons, causing severe erosion and numerous small breaks. Several bad breaks caused the partial destruction of considerable embankment upstream. Six of the breaks varied from 80 to 147 feet wide and generally were more than 20 feet deep. The record discloses that the rainstorm struck suddenly and that when it became evident that a flood was impending, Bureau of Reclamation personnel attempted to allay its force by telephoning the patrolman at Potholes, located upstream at the Laguna Dam site, to instruct him to cut the water out of the canal. Because of the fact that

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the telephone service was disrupted by the storm, the canal had broken before the word reached the foreman. The water accordingly was not cut out until 3:30 a. m. Damage caused by the flood waters required repair work over a distance of $5\frac{1}{2}$ miles on the Yuma Main Canal.

II

The Interior Department Appropriation Act, 1943 (56 Stat. 506), appropriated funds for the payment of damages caused to the owners of lands or other private property of any kind by reason of the operations of the United States, its officers or employees, in the survey, construction, operation, or maintenance of irrigation works. Substantially identical provisions have appeared in the appropriation acts for the Department for the last 26 years. The Comptroller General has held that to warrant recovery under these provisions the damage must result from a *direct* act of the United States, its officers or employees, in which the element of negligence does not appear. (Decision of the Comptroller General, A-45268, rendered October 22, 1932.) Aside from a general imputation of negligence (hereinafter discussed) on the part of the Bureau of Reclamation, the basis upon which the present claims are filed appears to be reflected in the statements of three Bureau of Indian Affairs employees, Director of Irrigation A. L. Wathen, Superintendent C. H. Gensler, and Extension Agent Donald Gordon. Irrigation Director Wathen observes that "In view of the recurrence of these breaks and the flooding of Indian lands it would appear that there might be a chance of showing that the Government should by this time be able to determine more accurately the character and extent of construction necessary to protect the landowners." It does not appear, however, that the Government was charged with affirmative action looking toward the protection of landowners. Extension Agent Gordon states that certain lands near the drainage outlet were flooded by waters backing up because "the drainage outlet consists of two 3 x 5 ft. openings which are inadequate to handle a flood of much smaller proportions than the one just experienced." It would appear, however, that even though it could have been shown that under ordinary circumstances the Bureau of Reclamation was chargeable with responsibility for the maintenance of adequate openings, the nature of the 1939 flood very probably would have precluded responsibility for damage in that instance, since it is shown that the water table of the entire area was upset by the flooded condition of the Colorado River as a result of the storm. Superintendent Gensler asserts that the control works for the prevention of

floods from the Picacho, Unnamed, and Bee Washes were "in bad repair at the time of the flood on September 4, 5, and 6, 1939," and that "the reservoir was about filled up with sand and silt, leaving no space for the flood water storage, and to my knowledge, no repair work had been done recently on the retaining walls." None of the foregoing statements is sufficient to support a finding that the proximate cause of the damage sustained was an omission or a direct nonnegligent act of commission on the part of officers or employees of the Bureau in the construction, operation, or maintenance of the reservoir and irrigation works. The provisions of the appropriation act, *supra*, accordingly are not applicable.

III

The act of December 28, 1922 (42 Stat. 1066, 31 U. S. C. sec. 215), confers upon the head of each department and establishment in behalf of the Government of the United States the authority to consider any claim on account of damages to or the loss of privately owned property where the amount of the claim does not exceed \$1,000, caused by the negligence of any officer or employee of the Government acting within the scope of his employment. The record contains uncontroverted evidence of the fact that the September 4 to 6, 1939, storm was the worst that had ever struck the vicinity of the Yuma Irrigation Project, as to both the amount and the periodic intensity of the rainfall. The questions remaining for consideration are, in view of these acknowledged facts, whether the flood which caused the damage proximately resulted from negligence on the part of the Bureau of Reclamation, whether the storm was in fact of so extraordinary nature as to constitute the resulting flood an act of God, beyond the control of the Bureau of Reclamation, and for the consequences of which it could not be held liable, or whether despite the fact that it was an act of God, concurring negligence of the Bureau of Reclamation combined with that act to cause the damage complained of. On the general question of the liability of the owner of an irrigation works, it is stated in *Wiel on Water Rights* (3d ed., 1911), section 462, as follows:

Where the overflow results from a flood, it is still a question of use of due care; there being no liability for such extraordinary floods as would surprise caution, but being liable where the floods were periodical or might have been anticipated. There is no liability for damage from floods that could not be anticipated, or from rainstorms of such unusual severity as to surprise caution. A flood resulting from an unprecedented rainstorm causes no liability, but floods that are of periodical occurrence must be guarded against by the ditchowner, as it is possible to take precautions against floods of that kind. (*Salton Sea Cases*, 172 F. 820; *Turner v. Tuolumne etc. Co.*, 25 Cal. 397, 1 Morr. Min. Rep. 107; *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197.) In

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the last case cited the court says: "The injury complained of occurred in a season of high water caused by the melting of the snow on the mountains above. The overflow so caused is periodical, and may be, and is, anticipated by all persons inhabiting the regions where the alleged damage occurred. The obligation rested on defendant to keep the banks of its canal in repair. It was bound to use ordinary diligence for this purpose. The diligence required, however, must be commensurate with the duty, and the duty is that ordinarily employed by a prudent business man when dealing with his own affairs under the circumstances which surround him and call his mind and energy into action."

The California law applicable in the circumstances of the present case is well set forth in *Nahl v. Alta Irrigation District*, 23 Calif. App. 333, 137 Pac. 1080 (1913), wherein the court says:

There can, of course, be no question as to the duty and obligations resting upon the owner of an irrigating ditch in his relations as such with the public. He must so construct and maintain it as that, in its operation, by the exercise of reasonable or ordinary care, no damage will result to others. To him, as well as to all persons, must obviously be applied the principle that one must so use his own property as not to injure that of others * * *. "He is bound to keep his ditch in good repair, so that the water will not overflow or break through its banks and destroy or damage the lands of other parties, and if, through any fault or neglect of his in not properly managing and keeping it in repair, the water does overflow or break through the banks of the creek" and injures or destroys the land or property of others, the law will hold him responsible therefor. *Richardson v. Kier*, 34 Cal. 63, 74, 91 Am. Dec. 681. But he is not an insurer against all damages arising from his ditches, but is liable when negligent in the construction, maintenance, and operation thereof. He is, in other words, required to exercise reasonable or ordinary care only in the construction, maintenance, and operation of his ditches. 3 Current Law, p. 1125, notes 106 and 110; *King v. Miles City Irrigating Co.*, 16 Mont. 463, 41 Pac. 431, 50 Am. St. Rep. 506; *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197; *Grand Valley Irrigation Co. v. Pitzer*, 14 Colo. App. 123, 59 Pac. 420; *Wiel on Water Rights in the Western States* (2d Ed.), pp. 256, 257. Nor is a ditch or canal owner responsible for that which is solely the result of the act of God, or inevitable accident. It is only when human agency is combined with the act of God and neglect occurs in the employment of such agency that a liability for damage results from such neglect. *Polack v. Pioche*, 35 Cal. 416, 95 Am. Dec. 115; *Chidester v. Consolidated Ditch Co.*, 59 Cal. 197, 202; *Proctor v. Jennings*, 6 Nev. 83, 88-90, 3 Am. Rep. 240; *Jordan v. Mount Pleasant*, 15 Utah, 449, 49 Pac. 746; *Lisonbee v. Monroe Irrigation Co.*, 18 Utah 343, 54 Pac. 1009, 72 Am. St. Rep. 784, 786; *Mathews v. Kinsell*, 41 Cal. 512; monographic note to *McCoy v. Danley*, 57 Am. Dec. 690, 691; *McKee v. Delaware, etc., Canal Co.*, 125 N. Y. 353, 26 N. E. 305, 21 Am. St. Rep. 740, and note.

There is authority for holding that rainstorms resulting in floods, recurring with increased volume, even at greater intervals than was the case with regard to the 1939 flood, may not be considered acts of God. In *Eikland v. Casey* (C. C. A. 9, 1920), 266 Fed. 821, *cert. den.* 254 U. S. 652, 41 Sup. Ct. Rep. 149, 65 L. ed. 458, after reviewing

decisions of other courts at some length, the court held that recurring rainstorms resulting in floods of increasing volume were not acts of God. The court said the floods were "not usual and ordinary, but they were unusual and beyond ordinary,—i.e., extraordinary,—and yet it is just as certain that like rainfalls will occur in the future as it is that the same laws of nature by which they are produced, and the same conditions to be affected by those laws will continue to exist in the future as they have in the past." In the *Eikland* case, as well as those reviewed by the court in its decision, however, there were involved well-defined watercourses, continually utilized. Here there was no well-defined flowing stream. Instead, the waters converging upon the irrigation works were the result of sudden, torrential rainstorms, in the form of "flash" floods, resulting from cloudburst-like precipitations which broke without warning in the mountains. The waters descended rapidly into canyon-like depressions known as "washes," gaining momentum as they descended over smooth, underlying strata, eroded by the previous movements of waters downward to the Colorado River. Because of the great variance in the physiographic features involved, the holding in the *Eikland* case would be inapplicable to the 1939 flood as constituting an insurer's liability, to which the United States is not held. *Louisiana v. McAdoo*, 234 U. S. 627 (1914).

With regard to the statement of Indian Agent Gordon, *supra*, even though it were to be held that the Bureau of Reclamation was responsible for maintaining adequate openings, the extraordinary circumstances of the present case would appear to preclude liability for damages, for it is shown that the entire countryside was subjected to flood conditions by the storm and that "the Colorado was at flood stage * * *" so that "this water from the canal breaks which had entered the California main drain could not escape readily into the river" because of the consequent raising of the water table in the entire area along the river.

The statement of Indian Superintendent Gensler, *supra*, to the effect that the control works for the prevention of floods from Picacho, Unnamed, and Bee Washes were in bad repair at the time of the flood; that the reservoir was nearly filled up with sand and silt, leaving no space for flood water storage, and that to his knowledge no repair work had been done recently on the retaining walls is entitled to weight. Assuming, however, without so holding, that the Superintendent's statements were sufficient to establish a certain degree of negligence in the maintenance of the control works and reservoir, in view of all of the facts and circumstances of the present case such negligence would appear to be too microscopic to be deemed a proxi-

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mate cause of the damage either of itself or in combination with other forces. Concurring negligence, in order to create liability, must be shown to have been in itself a real, producing cause of the damage. *Perkins v. Vermont Hydro-Electric Corporation*, 106 Vt. 367, 177 Atl. 631 (1934).

The record reflects throughout suggestions that the Bureau of Reclamation should be held responsible for damages resulting from the 1939 flood because the previous floods constituted notice to it that the Detention Reservoir is inadequate to protect against recurring floods. These suggestions, however, appear to overlook the repeatedly stated fact that the reservoir was neither constructed nor operated for the purpose of protecting against flood waters. Even though it were conceded, which it is not, that the reservoir was built for the purpose of protecting beneficiaries of the irrigation system from floods, there has been submitted no evidence to substantiate a conclusion that the Bureau of Reclamation was or would be obliged to guarantee, by increasing its size or otherwise altering the reservoir, against unprecedented floods of constantly increasing volume. The case of *Piqua v. Morris*, 98 Ohio St. 42, 120 N. E. 300 (1918), involving a somewhat similar set of circumstances, is peculiarly applicable here. In that case the court said:

From a careful consideration of this record, in connection with the general knowledge concerning this extraordinary flood, we think that the jury were convinced that the flood itself was the sole cause of the injury complained of, and that it could not have been prevented by the doing of any of the things suggested.

An apt illustration which has been suggested is that if a river levee had been maintained at the height of 10 feet, and the custodians of the levee had been warned that flood waters might require a levee 16 feet in height, and they neglected to so increase the height of the levee, and an unprecedented flood should ensue, during which it should appear that a levee 26 feet in height would not have held the flood waters, the parties responsible for the levee would not be liable for negligence in failing to maintain a 16-foot levee, when a 26-foot levee would have been unavailing.

See also *Cook v. Minneapolis, St. P. & S. Ste. M. R. Co.*, 98 Wis. 624, 74 N. W. 561 (1898); 38 Am. Jur., Negligence, sec. 65.

Applicable also is the holding in *Cole v. Shell Petroleum Corporation*, 149 Kans. 25, 86 P. (2d) 740 (1939), wherein the court said:

The record fails to disclose plaintiff's crops would not have been damaged or that they would not have been damaged to the same extent except for the structures themselves or the structures as maintained. In fact we think the record discloses the damage occurred independent of the structures as maintained. That being true there could be no recovery even though it were conceded, which it is not, that defendant had been negligent in the erection or maintenance of the structures. See essay on "The Proximate Consequences

of an Act" by Joseph H. Beale in Selected Essays on the Law of Torts by Harvard Law Review Association, page 734; Restatement, Torts, section 432(1), Comments on Sec. 1, and illustrations No. 2; *Perkins v. Vermont Hydro-Electric Corp.*, 106 Vt. 367, 177 A. 631; *Ford v. Trident Fisheries Co.*, 232 Mass. 400, 122 N. E. 389; *City of Piqua v. Morris*, 98 Ohio St. 42, 120 N. E. 300, 7 A. L. R. 129; *Sowles v. Moore*, 65 Vt. 322, 26 A. 629, 21 L. R. A. 723. In the *Perkins* case, *supra*, it was held: "Except where there are joint tortfeasors, tort cannot be considered legal cause of damage if such damage would have occurred had tort never been committed, rule being that in order to justify recovery negligence must form what is usually called proximate cause, but which may more accurately be termed efficient and producing cause of injury."

"One guilty of negligence is liable for all injurious consequences flowing from his negligence, until diverted by intervention of some efficient cause making injury its own, or until force set in motion by negligent act or omission has so far spent itself as to be too small for law's notice."

A review of all of the evidence available establishes that the 1939 flood was unprecedented in both force and volume. Even though the irrigation canals and reservoir of the Yuma Project had been in the best state of repair at the time, the damage inflicted by the flood waters nevertheless would have resulted. *Cf. United States v. Sponenbarger*, 308 U. S. 256, 265-266 (1939); *Danforth v. United States*, 308 U. S. 271, 279, 286 (1939). If the canals and reservoir of the Yuma Project were in disrepair, and if there were negligence on the part of the Bureau of Reclamation, this disrepair and negligence in no way served to increase the damage caused and would not, therefore, warrant a finding of concurring negligence so as to render the Bureau liable. In these circumstances there is no occasion to determine whether the canals and reservoir were in a state of disrepair or whether the conduct of the Bureau of Reclamation employees was such that a causal relation between it and the damage would have permitted recovery under the 1922 act, *supra*.

In conclusion, it is my opinion that the damage for which recovery is sought was caused neither by an omission nor by a direct act of commission on the part of an officer or employee of the Government in the survey, construction, operation and maintenance of the irrigation works, recovery for which is provided by the appropriation act, *supra*, nor by negligence, recovery for which is provided by the 1922 act, *supra*. The 1939 flood, as the result of which recovery of damages is sought, was caused by *vis major*, an act of God, over which the Government had no control and for which it therefore cannot be held liable. The claims accordingly should be rejected.

Approved:

HAROLD L. ICKES,

Secretary of the Interior.

APPLICABILITY OF THE HATCH ACT TO OFFICERS AND EMPLOYEES OF THE TERRITORY OF ALASKA

Opinion, April 5, 1943

FEDERAL EMPLOYEES—ADMINISTRATIVE POSITIONS—GOVERNOR AND SECRETARY OF TERRITORY—POLITICAL ACTIVITY—SECTION 2 OF HATCH ACT.

Since the Governor and the Secretary of the Territory of Alaska are appointed by the President, by and with the advice and consent of the Senate, and since their salaries are paid from the Federal Treasury, they must be regarded as employed in "administrative" positions "by the United States" and hence subject to the prohibition in section 2 of the Hatch Act against the use of "official authority for the purpose of interfering with, or affecting, the election or the nomination of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, or Delegate or Resident Commissioner from any Territory or insular possession."

FEDERAL EMPLOYEES—EXECUTIVE BRANCH—GOVERNOR AND SECRETARY OF TERRITORY—POLITICAL ACTIVITY—SECTION 9(a) OF HATCH ACT.

The Governor and the Secretary of the Territory of Alaska, while employed in the executive branch, are not to be regarded as employed in the executive branch of the Federal Government, within the meaning of section 9(a) of the Hatch Act, forbidding officers and employees thereof to use "official authority or influence for the purpose of interfering with an election or affecting the result thereof," or to take "any active part in political management or in political campaigns," since (1) the context of the entire section reflects an intention to exclude policy-making positions, and (2) reference to subsequent enactments indicates a legislative recognition that Territorial officers theretofore had been unaffected by the act.

GARDNER, *Solicitor*:

At the request of the Governor of Alaska, certain questions concerning the scope of the application of the Hatch Act¹ to the Governor and the Secretary of Alaska have been submitted to this office for opinion.

In an opinion approved April 3, 1943 (58 I. D. 390), *supra*, I was called upon to consider similar questions in connection with the Governor and the Secretary of Hawaii. In that opinion it was held, *inter alia*, (1) that each of those officers is employed in an "administrative position by the United States," and that both therefore are subject to the prohibition in section 2 of the Hatch Act against the use of official authority or influence for the purpose of interfering with or affecting certain nominations and elections, and (2) that neither officer is employed "in the executive branch of the Federal Government," and therefore that neither is subject to the provisions

¹ Act of August 2, 1939 (53 Stat. 1147), as amended by the acts of July 19, 1940 (54 Stat. 767), and March 27, 1942 (56 Stat. 176, 181, 18 U. S. C. sec. 61 *et seq.*).

of section 9 of the Hatch Act. For reasons which will be discussed briefly I am of the opinion that these conclusions are equally applicable to the Governor and the Secretary of Alaska.

The conclusion that the Governor and the Secretary of Hawaii are employed in "administrative" positions "by the United States," within the meaning of section 2, was based on the fact that they are appointed by the President, by and with the advice and consent of the Senate,² and the fact that their salaries are paid from the Federal Treasury.³ These facts obtain also with respect to the Governor and the Secretary of Alaska.⁴

The conclusion that neither the Governor nor the Secretary of Hawaii is employed "in the executive branch of the Federal Government" was based on an interpretation of section 9 which excluded those persons from the scope of the legislative intention by reason of (1) the dignity of their offices,⁵ and (2) the effect to be given to the subsequent enactment of sections 12(a) and 19 of the Hatch Act,⁶ reasons which appear clearly to be applicable to the offices of the Governor and the Secretary of Alaska.

It therefore is my opinion that—

(1) The Governor and the Secretary of the Territory of Alaska each is employed in an "administrative position by the United States," and both therefore are subject to the prohibition in section 2 of the Hatch Act against the use of official authority or influence for the purpose of interfering with or affecting certain nominations and elections;

(2) The Governor and the Secretary are not employed "in the executive branch of the Federal Government," and therefore are subject to none of the provisions of section 9.

Approved:

ABE FORTAS,

Under Secretary.

² Sections 66 and 69 of the Organic Act of Hawaii (act of April 30, 1900, 31 Stat. 154, 48 U. S. C. secs. 531 and 534).

³ See, e.g., Interior Department Appropriation Act, 1943 (act of July 2, 1942, 56 Stat. 506, 559).

⁴ Act of June 6, 1900 (31 Stat. 325, 48 U. S. C. sec. 62); R. S. § 1843 (48 U. S. C. sec. 1454); Interior Department Appropriation Act, 1943 (act of July 2, 1942, 56 Stat. 506, 558).

⁵ The duties and functions of the Governor of Alaska are defined by section 2 of the act of June 6, 1900 (31 Stat. 321, 322, 48 U. S. C. sec. 61). The duties and functions of the Secretary are defined by R. S. § 1844 (48 U. S. C. sec. 1455), and R. S. § 1843 (48 U. S. C. sec. 1454) provides that the Secretary shall act as governor in case of the latter's "death, removal, resignation, or absence."

⁶ It was held that the language of section 12(a), and section 19, which defines "State" to include "Territory," demonstrated a recognition by the Congress that section 9 had not been intended to apply to Territorial officers and employees.

MEANING OF "RESIDENT FARM OWNER" AND "RESIDENT ENTRYMAN"

Opinion, April 22, 1943

PUBLIC LANDS—ACT OF MAY 16, 1930—RESIDENCE—STATUTORY CONSTRUCTION—WORDS AND PHRASES.

Authority to sell lands designated under the act of May 25, 1926, as temporarily unproductive or permanently unproductive, to resident farm owners and resident entrymen on Federal irrigation projects, was given the Secretary by the act of May 16, 1930. This act and the homestead law are *in pari materia* and "resident entryman" means a homestead entryman who is actually residing on the land in his homestead entry, and "resident farm owner" means a farm owner who is actually residing on the farm he owns.

GARDNER, *Solicitor*:

In your [Commissioner, Bureau of Reclamation] memorandum of March 9, you ask me for an interpretation of sections 1 and 2 of the act of May 16, 1930 (46 Stat. 367, 43 U. S. C. secs. 424 and 424a).

It appears that Wilbert W. Dove, owner of farm unit "D" of Sec. 19, T. 57 N., R. 97 W., 6th P. M., Shoshone Project, Wyoming, has made application to purchase certain tracts adjoining his present unit which have been designated for sale under the regulations of May 28, 1942. Dove left his farm for California about January 7, 1940. He leased the land to his son but retained the house thereon as his home. He went into war work in San Diego and says he has not established residence in California, has never voted there but votes in Wyoming by absentee vote. He states that it was his intention on leaving, and is still his intention, to return to his farm "as soon as the war is won."

The pertinent part of the cited statute is as follows:

That the Secretary of the Interior, hereinafter styled the Secretary, is authorized in connection with Federal irrigation projects to dispose of vacant public lands designated under the Act of May 25, 1926, as temporarily unproductive or permanently unproductive to resident farm owners and resident entrymen on Federal irrigation projects, in accordance with the provisions of this Act.

Sec. 2. That the Secretary is authorized to sell such lands to resident farm owners or resident entrymen, on the project upon which such land is located, at prices not less than that fixed by independent appraisal approved by the Secretary, and upon such terms and at private sale or at public auction as he may prescribe: *Provided*, That no such resident farm owner or resident entryman shall be permitted to purchase under this Act more than one hundred and sixty acres of such land, or an area which, together with land already owned on such Federal irrigation project, shall exceed three hundred and twenty acres: * * *

The question is whether Dove is a resident farm owner on the Shoshone Project.

The adjective "resident" is a word of flexible legal meaning. It has been construed to mean "an occupier of lands, a resident, a permanent resident, one having a domicile, a citizen, or a qualified voter." *In re Town of Hector*, 24 N. Y. S. 475, 479. Its true meaning depends upon the context, object and purpose of the statute in which it occurs. *United States v. Nardello*, 4 Mackey (D. C.) 503.

This law deals with vacant public lands and with those already entered under the homestead law. Its restriction of the class of eligible purchasers to entrymen and former entrymen of homestead lands, its limitation of the size of a purchase, and its brief legislative history,¹ all point to an adoption of the object and purpose of the homestead law which is stated to be "to induce settlement, cultivation, and the establishment of homes upon the public lands." *Ware v. United States*, 154 Fed. 577, 584. These statutes are *in pari materia* and methods prescribed to accomplish the purpose of one are applicable to the other. It is therefore material to inquire into the nature of the residence required under the homestead law for, nothing to the contrary appearing, it governs here.

As originally enacted, the homestead law required the entryman's "residence" on the land. Section 2291, Revised Statutes. In 1912, however, it was amended by adding the word "actual" before "residence." Act of June 6, 1912 (37 Stat. 123, 43 U. S. C. secs. 164, 169). The nature of this requirement has recently been described as follows: "'Actual residence' under the homestead laws means personal presence and physical occupation of the premises as a home. It means precisely the same thing as actual inhabitancy. There must be a settled, fixed abode, and that to the exclusion of a home elsewhere. The phrase means the same now that it always has meant, and the Department has never sought to apply it, define it, or construe it in any other way." *Hazel L. Hartley-Johnson*, 51 L. D. 513, 514. See also *Benjamin Chainey*, 42 L. D. 510 and *Josephine M. Locher*, 44 L. D. 134.

It is apparent, then, that in the act of May 16, 1930, *supra*, "resident entryman" means a homestead entryman who is actually residing on the land in his homestead entry; and that "resident farm owner" means a farm owner who is actually residing on the farm he owns.

Doubtless, some absences on the part of a farm owner, as on the part of an entryman, are permissible where properly explained. Dove, however, has failed to bring himself within the spirit of this law. He has confessedly absented himself from his farm for a period in excess of three years. The record contains uncontradicted evidence

¹ 69 Cong. Rec., part 4, pp. 4105, 4106, 70th Cong., 1st sess. (March 5, 1923) on H. R. 9953; 72 Cong. Rec., part 2, pp. 1985, 1986, 71st Cong., 2d sess. (January 20, 1930).

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that he attempted to sell the farm to his son. His assertion that he intended when he left and still intends to return is vague, indefinite and unsubstantiated. These provide little, if any, evidence of an intention to regard his farm as his home to the exclusion of all others. The fact that he continues to vote locally is entitled to some weight, but, standing alone, it is clearly not conclusive.

In my opinion therefore, Wilbert W. Dove is not now a resident farm owner and is not qualified to purchase lands under the 1930 act.

Approved:

OSCAR L. CHAPMAN,

Assistant Secretary.

LIABILITY OF THE UNITED STATES FOR STATE TAXES LEVIED UPON GOVERNMENT CONTRACTORS

Opinion, April 23, 1943

COST-PLUS-FIXED-FEE CONTRACTS—STATE SALES AND USE TAXES—AVOIDANCE OF TAXES BY DESIGNATING CONTRACTOR AGENT OF THE GOVERNMENT.

The Federal Government is not exempt from the payment of the cost of State sales and use taxes levied upon purchases made by its contractors under a cost-plus-fixed-fee contract although the goods purchased become the property of the Government upon shipment or delivery. In the absence of authorizing legislation, the use of purchase order forms by a Government contractor designating him as an agent for the Government is not a suitable means of avoiding the application of State sales and use taxes to purchases by the contractor under the contract.

GARDNER, *Solicitor*:

Reference is made to my memorandum to you [Director, Bureau of Mines] of April 5 criticizing certain purchase order forms of the Stearns-Roger Company for use in connection with contract No. Im-1222 for the construction of a helium plant at Otis, Kansas. It was pointed out that the effect of these forms is to make the contractor a purchasing agent for the Government in violation of the express terms of the contract, at least with respect to contracts over \$2,000 in amount, and probably in contravention of desirable administrative practice and of the requirements for the use of Government purchase order forms. Since the date of my memorandum I have been advised that the purchase orders were devised in the form objected to for the particular purpose of avoiding the application of State of Kansas sales and use taxes to purchases of materials and supplies for the construction project.

There are two sorts of State sales and use taxes: those that impose the tax on the vendors of the goods, and those that impose it on the

purchasers of the goods. In both cases the vendor pays the tax to the State, but in the first case he collects it from the purchaser only indirectly and to the extent that it is reflected in the general prices charged for his goods; while in the second case the vendor collects the tax as such from the purchaser, separate from or as a fixed added part of the purchase price. In the second case, the tax is said to be laid on the purchaser (*Federal Land Bank v. Bismarck Lumber Co.*, 314 U. S. 95), and nearly all State sales and use taxes, including those of the State of Kansas, are of this sort. Purchases by the Government on its own account are exempt from State taxes of the second sort—where the incidence of the tax is by law laid on the purchaser. This fact suggests that one way to avoid the application of the taxes to purchases for the construction project is to buy on Government purchase order forms without the intervention of the contractor. The contract in terms permits this (section 3 of Article II), but it may be that such purchasing would be cumbersome and throw upon the Government a burden that the contractor is paid to bear. The purchase orders in question were designed to leave the burden of purchasing on the contractor, and at the same time secure exemption for the Government from the State taxes.

A Government contractor under a lump-sum contract must ordinarily pay State sales and use taxes, and properly includes these taxes in the amount he bids on the contract, thus passing them on to the Government. On the other hand, with the advent of cost-plus-fixed-fee contracts, it was the contention of various Government contracting agencies that these State taxes could not be levied upon purchases by such Government contractors of goods which became the property of the Government upon shipment or delivery. All doubt on this question was resolved by the recent decisions of the Supreme Court in the case of *Alabama v. King and Boozer* (314 U. S. 1), and the companion case of *Curry v. United States* (314 U. S. 14). These cases held that the Government contractor under the cost-plus-fixed-fee contract there in question must pay the sales and use taxes levied by the State of Alabama. The cost-plus contract and the State tax laws in those cases were essentially the same as the Bureau's contract for construction at Otis and the tax laws of Kansas. The court pointed out that the contract negatived any conclusion that the contractor might act as the agent for the Government in making purchases, and that the purchase order forms used showed on their face that the purchases were for the contractor's own account and not the account of the Government.

It was, no doubt, with these cases in mind, and with the intention of relying upon the implication therefrom of the possibility of tax

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avoidance if the contractor should act as agent for the Government, that the objectionable purchase order forms were devised. Use of such procedure, however, would be an attempt to accomplish by indirection a thing that Congress has several times declined to authorize by legislation. Various bills have been introduced in Congress, several of them since and because of the Supreme Court decisions above cited, to exempt from State taxation purchases by contractors for use on Government construction projects (H. R. 6049, H. R. 6582, H. R. 6617, H. R. 6750, H. R. 6955, 77th Congress), but none of them was ever reported by the House Ways and Means Committee to which they were referred. An attempt was made and rejected to secure statutory authority for the precise procedure contemplated by the objectionable purchase order forms—the appointment of the contractor as the agent for the Government. (Proposed Senate Amendment No. 120, to H. R. 8438, Cong. Rec., 76th Cong., 3d sess., Vol. 86, Part 7, pp. 7518–19, 7527–7535, 7648.)

I am advised that the War Department has considered the use of purchase orders in the form under consideration, but has decided against it for the reasons set forth herein and in my prior memorandum. Moreover, it is the opinion of attorneys of the War Department that purchase orders in the form suggested will not accomplish the purpose. It may be doubted if the States would accept for this purpose anything but a formal appointment of the contractor as the Government's agent, or that such an appointment can be made without statutory authority. I therefore remain of the opinion previously expressed, that the forms should not be used.

In spite of the foregoing, I believe that the Bureau will find that it does not have to pay any sales or use taxes on its construction in the State of Kansas. That State imposes four taxes of this type, as follows:

1. Retailers' Sales Tax.—Two percent upon the gross receipts from retail sales of tangible personal property and of certain services (1939 Supp. to Gen. Stats. of Kans., sec. 79–3601 *et seq.*, as amended).

2. Compensating Tax.—For the privilege of using within the State tangible personal property purchased at retail subsequent to May 30, 1937, at the rate of two percent of the purchase price (1939 Supp. to Gen. Stats. of Kans., secs. 79–3701 to 79–3711, as amended).

3. Motor Fuel Tax.—Three cents per gallon on the use, sale, or delivery in the State of motor vehicle fuel, as defined by the act (Gen. Stats. of Kans., secs. 79–3401 to 79–3432, as amended).

4. Special Fuel Use Tax.—Three cents per gallon on all users of fuel (other than motor vehicle fuel as defined in the Motor Fuel Tax Act) for the propulsion of motor vehicles upon the public

highways of the State (L. 1941—S. B. 269—effective July 1, 1941).

By an express provision of the Kansas statute, Government contractors under a cost-plus-fixed-fee contract are exempt from payment of the State Motor Fuel Tax. As to the other three taxes, I understand from the War Department that the State of Kansas has committed itself to a policy of not levying the taxes on purchases by Government contractors under cost-plus-fixed-fee contracts. The reason for adopting this policy is not known to me, but attorneys of the War Department say that the rule is placed on the theory that purchases by such contractors are for resale to the Government, and purchases for resale are exempt under the Kansas statutes. This seems to be something of a legal fiction, but it serves the purpose of the War Department and its contractors. The practice, I am told, is to clear the contract in advance with the State Commissioner of Revenue and Taxation, under the contract number and project designation, establishing it as a Government cost-plus-fixed-fee contract that is exempt from these taxes. Thereafter, it is the practice of the War Department to require contractors and subcontractors to include on the face of their purchase orders two statements somewhat as follows:

Any State or local sales, use, or similar tax included in the amounts billed MUST be separately stated and itemized; and it is understood that acceptance of this order shall constitute an agreement that unless such taxes are separately stated and itemized, no such taxes are included in the amounts billed.

The purchases set forth on the face hereof are for and on account of a cost-plus-fixed-fee contract with the United States of America, and Kansas Sales and Use Taxes do not apply.

I believe that if the proper representations are made to the State Commissioner of Revenue and Taxation of Kansas, the desired exemption may be secured. If the Bureau or the contractor has a representative at the State capital, this might be the most expeditious way of arranging for the matter, but if it is to be done by mail, and the Bureau so desires, this office will be glad to lend its assistance.

NECESSITY FOR COMPETITIVE BIDDING IN SALE OF TIMBER ON OREGON AND CALIFORNIA REVESTED LANDS

Opinion, April 24, 1943

SECRETARY OF THE INTERIOR—OREGON AND CALIFORNIA REVESTED LANDS—SALE OF TIMBER—COMPETITIVE BIDDING—ACT OF AUGUST 28, 1937 (50 STAT. 874).

The sale of timber on the Oregon and California revested lands within sustained-yield forest units established under the act of August 28, 1937 (50 Stat. 874), may be consummated without competitive bidding and such timber is subject to disposal by other methods designed to secure a price

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reflecting its fair value. The competitive bidding requirement of the act of June 9, 1916 (39 Stat. 218), was repealed by the act of August 28, 1937.

GARDNER, *Solicitor*:

My opinion has been requested as to whether the sale of timber on revested Oregon and California Railroad grant lands within proposed sustained-yield forest units must be made pursuant to competitive bidding.

In my opinion the sale of such timber by competitive bidding is not required.

The administration of the Oregon and California revested lands was originally provided for in the act of June 9, 1916 (39 Stat. 218). Section 4 of this act provided for the sale of the timber, as rapidly as reasonable prices could be secured, "by the Secretary of the Interior, in cooperation with the Secretary of Agriculture, or otherwise, to citizens of the United States, associations of such citizens, and corporations organized under the laws of the United States, or any State, Territory, or District thereof, at such times, in such quantities, and under such plan of public competitive bidding as in the judgment of the Secretary of the Interior may produce the best results * * *."

The act of August 28, 1937 (50 Stat. 874), inaugurated an entirely new plan for the administration of the revested Oregon and California timber lands. The timber thereafter was to be cut on a sustained-yield basis. The act, so far as here relevant provides:

That notwithstanding any provisions in the Acts of June 9, 1916 (39 Stat. 218), and February 26, 1919 (40 Stat. 1179), as amended, such portions of the revested Oregon and California Railroad and reconveyed Coos Bay Wagon Road grant lands as are or may hereafter come under the jurisdiction of the Department of the Interior * * * shall be managed * * * for permanent forest production, and the timber thereon shall be sold, cut, and removed in conformity with the principle of sustained yield for the purpose of providing a permanent source of timber supply, protecting watersheds, regulating stream flow, and contributing to the economic stability of local communities and industries, and providing recreational facilities * * *.

The annual productive capacity for such lands shall be determined and declared as promptly as possible after the passage of this Act * * * *Provided*, That timber from said lands in an amount * * * not less than the annual sustained yield capacity when the same has been determined and declared, shall be sold annually, or so much thereof as can be sold at reasonable prices on a normal market.

If the Secretary of the Interior determines that such action will facilitate sustained-yield management, he may subdivide such revested lands into sustained-yield forest units, the boundary lines of which shall be so established that a forest unit will provide, insofar as practicable, a permanent source of raw materials for the support of dependent communities and local industries of

the region; * * * Due consideration shall be given to established lumbering operations in subdividing such lands when necessary to protect the economic stability of dependent communities. Timber sales from a forest unit shall be limited to the productive capacity of such unit and the Secretary is authorized, in his discretion, to reject any bids which may interfere with the sustained-yield management plan of any unit.

The first question is whether the act of August 28, 1937, was intended to repeal or supersede section 4 of the act of June 9, 1916, which required the sale of timber "by public competitive bidding." I am of the opinion that it was so intended. The methods of sale are certainly different in the two acts and a machinery created for a sale of the timber "as rapidly as reasonable prices can be secured therefor" would in its nature be inapplicable to sales "in conformity with the principle of sustained yield." The Comptroller General, in answer to a somewhat different problem under the two acts, has ruled (letter to the Secretary of the Interior dated February 27, 1939):

The act of August 28, 1937, 50 Stat. 874, fully covers the matters treated in the first five sections of the act of June 9, 1916, and provides an entirely new basis and procedure with respect to classification, use, and disposition of the land and timber * * * Consequently, under well established rules of construction the first five sections of the act of June 9, 1916, are to be regarded as repealed by the act of August 28, 1937.

The issue, then, turns on the scope of the act of August 28, 1937. It is to be noted that, in contrast with the act of June 9, 1916, it contains no express requirement for competitive bidding. Under familiar rules, the change in the provisions may be supposed to be deliberate and the Congress, in eliminating the express requirement, may be supposed to have meant to accomplish a change.

This conclusion is compelled when one considers the nature of the new system of timber marketing which Congress authorized in 1937.

The proposed sustained-yield forest unit plan (see memorandum, dated February 17, 1942, from the Chief Forester, Oregon and California Revested Lands Administration, to the Assistant Commissioner, General Land Office) involves the division of the Oregon and California and intermingled privately owned lands into master forest units which will be subdivided into smaller operating units. In accordance with the requirement of the act of August 28, 1937, before the lands are subdivided into forest units the Department, after published notice, will hold hearings thereon in the vicinity of such lands open to the attendance of State and local officers, representatives of dependent industries, residents, and other persons interested in the use of such lands. Both the federally owned lands and a majority of the privately owned lands within the units will

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be administered in accordance with the sustained-yield plan. The assent of the private owners will be secured by means of a cooperative agreement to be entered into between the operator owning or controlling a majority of the privately owned timber within the unit and the United States. The cooperative agreement, which is authorized by section 2 of the 1937 act, will subject the lands owned or controlled by the operator to the sustained-yield plan and will grant to the operator the right to cut the federally owned timber within the unit. The contribution "to the economic stability of rural communities and industries" required by the act, moreover, demands that the operator be one from the dependent community. This requirement also necessitates a continuation of this cooperative marketing arrangement for an indefinite period in the future. Each of the operating units, therefore, will of necessity have some one operator as the exclusive purchaser of the Oregon and California timber in the unit under a marketing arrangement of indefinite duration. There would, accordingly, be a flat contradiction between competitive bidding and the proposed sustained-yield forest unit management plan, and it cannot be supposed that Congress intended to undermine the sustained-yield forest unit principle by a contradictory requirement which leads to sale on the competitive market by a system designed only to produce the highest possible price.

The legislative history of the act, moreover, shows that a requirement of competitive bidding in connection with timber sales was not intended. While the committee reports (H. Rept. No. 1119, S. Rept. No. 1231, 75th Cong., 1st sess.) are silent on this score, the hearings on H. R. 5858, replaced by an identical bill H. R. 7618 which became the act in question, outline the sustained-yield unit timber sale policy in the following statement made by Mr. Rufus Poole, the Department of the Interior representative in connection with this Department-sponsored bill:

Purchasers shall pay for the timber as cut. Price shall be determined fairly and equitably after careful appraisal of the varying economic factors affecting values in each of the sustained yield units. In general, they should be in keeping with market prices of logs of similar value elsewhere in the same region. [P. 53.]

Finally, it may be noted that section 5 of the 1937 act authorizes the Secretary of the Interior "to perform any and all acts and to make such rules and regulations as may be necessary and proper for the purpose of carrying the provisions of this Act into full force and effect." Under this broad authorization the Secretary may prescribe such timber-selling methods as may be necessary and proper to advance the Congressional purpose. It cannot be supposed that

a marketing procedure must include competitive bidding in order to accomplish the sustained-yield management required by Congress.

I am informed that competitive bids have been secured in the past operations under the act of August 28, 1937. But this is neither a construction of the act nor evidence that competitive bidding is feasible under the proposed sustained-yield forest unit plan, for the lands had not been divided into sustained-yield management units. Prior to such a division, sustained-yield management looks only to the maintenance of the timber resource by a regulation and limitation of the timber cutting, and not to the stability of the dependent communities, except to the extent that such stability is affected by the maintenance of the resource; and prior to unit management there is no necessity that the logging be done by an operator from the dependent community.

One thing remains to be considered. The concluding clause of the act of August 28, 1937, provides that "the Secretary is authorized, in his discretion, to reject any bids which may interfere with the sustained-yield management plan of any unit." This does not, in my opinion, imply a requirement of competitive bidding. The provision does not specify *competitive* bid. The term "bid" is often used simply to signify an offer to purchase. In this case the context of the entire section suggests that only this usage was intended, since the term is employed following references to timber sales, which are provided for without any specific requirement of competitive bidding. So construed, the provision simply authorizes the Secretary to refuse to sell timber where a sale would interfere with the sustained-yield management plan. This might in some circumstances be necessary because the section provides that the timber "shall be sold" and that "not less than one-half billion feet board measure, or not less than the annual sustained yield capacity when the same has been determined and declared, shall be sold annually, or so much thereof as can be sold at reasonable prices on a normal market." In view of this mandatory language, it might well have been considered necessary to include the authority to reject bids in the statute in order to demonstrate clearly that the Secretary was not intended to be required to sell timber where he deemed such sales to conflict with sustained-yield management. Finally, as indicated above, competitive bidding is not necessarily a contradiction of sustained-yield management prior to the division into sustained-yield units, at least if there be power to reject high bids which otherwise are unsatisfactory. The provision, then, would be an appropriate authorization for such a program while not intended to be a self-defeating impediment to the sustained-yield unit management.

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You are advised, accordingly, that the sale of timber on the Oregon and California revested lands within sustained-yield forest units may be consummated without competitive bidding and such timber is subject to disposal by other methods designed to secure a price reflecting its fair value.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

CHARLES C. ANDERSON AND JOHN H. WATSON AND SON

Decided April 24, 1943

GRAZING LICENSES—BASE PROPERTY—LAND OR WATER.

While a determination whether land or water shall constitute base property in a given instance is a matter of discretion and is not lightly to be disturbed on appeal, a record showing that a particular water was the sole one serving an area of Federal range during the priority period, that such range cannot now be appreciably utilized without the use of such water, that no person other than the one controlling the land upon which the water is located can legally enjoy access to it, and that other waters in the district have been recognized as base property, is insufficient to support a rejection of an application for a license based on such water.

GRAZING LICENSES—BASE PROPERTY—WATER—EXTENT OF PRIORITY.

Water developments made subsequent to the priority period cannot affect the rating which a water should receive; otherwise licenses or permits based on water would be unstable and subject to defeasance by subsequent water developments.

GRAZING LICENSES—BASE PROPERTY—EVIDENCE OF OWNERSHIP OR CONTROL.

The Grazing Service should not be required to adjudicate applications for grazing licenses wherein the ownership or control of the base property is indefinite, and in such instances it is within the authority of the Grazing Service to withhold the issuance of the licenses until such ownership or control has been satisfactorily shown.

CHAPMAN, *Assistant Secretary:*

Appeals have been taken by Charles C. Anderson and John H. Watson and Son, the latter being a partnership consisting of John H. Watson and son Odell Watson, from a decision of an examiner of the Grazing Service which affirmed the decisions of the district grazer on certain applications which the appellants filed for 1942 grazing licenses in Utah Grazing District No. 4 (Virgin).

On January 29, 1942, Anderson filed an application for a license to graze 2,000 sheep from May 15 to September 15, 1942, upon range

within what is known as the "Elbow Unit" of District No. 4. Anderson had been granted such a license for the previous year.

On February 17, 1942, Anderson and John H. Watson and Son applied for a joint license to graze 2,000 sheep from May 15 to August 15, 1942, upon range within the "Elbow Unit."

By letters of March 5, 1942, notices were sent to the applicants, advising them that the applications had been approved for 200 sheep to be grazed from May 15 to August 15, 1942, on range in the "Elbow Unit," and rejected as to 1,800 sheep.

On March 25, 1942, an application was filed by John H. Watson and Son for a license to graze 2,000 sheep from July 1 to September 30, 1942, in the "Elbow Unit," and by a notice of June 26, 1942, the Watsons were advised that the application was approved for 200 sheep to be grazed from May 1 to July 31, 1942, and rejected as to 1,800 sheep.

The applications referred to are incomplete in that the base property offered in support of the applications does not clearly appear. However, from the various letters and other data in the record it is apparent that the base property in each case consists of a tract of land known as the "Anderson tract," and certain waters thereon. The tract embraces 1,240 acres of privately owned and leased State lands, and is situate on Kanab Creek. Apparently the Watsons and Anderson have certain livestock interests in common and have attempted to vest control of the base property in both of the parties so that they can be eligible to receive jointly the license based thereon. On January 28, 1942, the Watsons executed what is styled a "Transfer of Grazing Privileges," wherein they provide that they "transfer to Charles C. Anderson of Glendale, Utah, sufficient AUM's of our Base Properties to qualify him in the Elbow Unit, District #4 Utah, for Two Thousand head of sheep for 90 days each year." There is also with the record an original copy of a lease by Anderson to the Watsons of the 1,240-acre tract above referred to. This lease is for three years and is dated March 13, 1942.

Just what interests the parties retain in the base property and how their livestock operations and business dealings are interconnected are not fully disclosed. However, it appears that they have some sort of an arrangement whereby, at the time of the year when they expect to graze on the "Elbow Unit," parts of their herds will be run together. (Tr. 98.) Also, in what is claimed to be the interests of economy and efficient operation, it is intended that certain sheep (dries) from other herds will be grazed in common with those of Anderson and the Watsons. (Tr. 124, 125, 127.)

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Utah Grazing District No. 4 has been divided into a number of administrative units, and each of these units has been given a local name. The particular unit involved in this case, i. e., the Elbow Unit, is part of a larger area which, because of certain difficulties of administration, is known as the Kanab Problem Area. Primarily, the question involved in the present appeals has to do with the rights of the appellants to receive licenses to graze in the Elbow Unit and with the extent of such licenses.

Upon receipt of notice of the partial rejection of the applications listed above, protests were filed and duly considered by the advisory board, but after reconsideration the original recommendations of the board were sustained. The applicants then appealed and, on June 26, 1942, the case was heard at Cedar City, Utah, before an examiner who, on October 5, 1942, rendered his decision affirming the action theretofore taken.

The record shows that, in the issuance of licenses in the Kanab Problem Area, only land has been considered as base property, although in the remainder of the grazing district water also is considered as base property. (Tr. 76.) Also, the season of use of the Federal range has been set at six months in each year, thus automatically making it necessary for licenses to be limited to the number of livestock that can be supported on the base property during the six months when it is necessary for the livestock to be kept off the Federal range. In addition, the Federal range has insufficient carrying capacity to satisfy all of the qualified demand for grazing privileges, and thus certain horizontal reductions have been made in the case of all licenses in the Area. The particular base property here in question, i. e., the 1,240-acre tract referred to above, was found by range examiners of the Grazing Service to have a carrying capacity of 160 animal-unit months. As pointed out by the examiner in his decision, there was an obvious error in this calculation, for it appears that certain leased lands in the tract embrace 920 acres instead of 960 acres as assumed by the range examiners. The actual carrying capacity of the entire 1,240-acre tract is thus 155 animal-unit months instead of 160.

In the Kanab Problem Area, it has been found that the Federal range has a carrying capacity of 30,219 animal-unit months, whereas the total qualified demand is in excess of that number, thus requiring the horizontal reduction of all licenses in that area. It should be noted in passing, however, that the record indicates that there may have been an error in calculating the percentage of satisfaction of qualified demand in the area.

In his testimony at the hearing, E. H. Murdock, grazier aide, stated that the qualified demand in the Kanab Problem Area was 40,765 animal-unit months from all classes of property, whereas the carrying capacity of the available Federal range was only 30,219 animal-unit months. (Tr. 15.) However, it appears that in the issuance of licenses in the area, only holders of Class 1 properties were licensed, and the Class 1 qualified demand was only 35,213 animal-unit months. If, in fact, the 35,213 animal-unit months represent only the Class 1 demand, and that demand is all that participated in the 30,219 animal-unit months of Federal range use, it is apparent that there should be a satisfaction of that demand to the extent of 85.8 percent, and a complementary reduction of 14.2 percent. It appears, however, that the reduction that has been imposed amounts to 26 percent, based on a determination that there can only be a 74 percent satisfaction of the qualified demand.

This latter figure would be correct if all demand, regardless of the class of base property from which it stems, has been considered for licenses, but if Mr. Murdock's statement that only Class 1 properties have been recognized is correct, then the figures accepted by the Grazing Service are wrong and all licenses in the area should be corrected accordingly.

However, calculating the license based on the land in the 1,240-acre tract mentioned above on the basis of 155 animal-unit months, less the 26 percent reduction required to meet the carrying capacity of the range, it was determined by the district grazier that a license should issue which called for the enjoyment of 115 animal-unit months of grazing privileges on the public domain. This is equivalent to 575 sheep for one month or 192 sheep for three months, approximately what was recommended by the advisory board and approved by the district grazier.

While there are a number of points in issue in the case, only a few need be discussed here.

It first appears advisable to discuss the failure of the district grazier to have recognized the water on the 1,240-acre tract as base property. This water is referred to in the record as the "Anderson water."

According to uncontroverted testimony in the record, the Anderson water was, during the priority period, the only water of any importance whatever which was available for use by livestock grazing on a considerable area of Federal range lying south of the 1,240-acre tract and above the White Cliffs. It is true that there are other waters in the area but none of these was more than a seep during the priority period and is little more today. It is claimed by the appellants that

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livestock using the Federal range referred to cannot use such range without access to the Anderson water.

It is true that the Department has held that the discretion to be exercised by the Grazing Service in the determination of whether land or water shall constitute base property in a given instance is one which will not lightly be disturbed. *Fremont Sheep Company*, A. 23170, decided January 20, 1942. However, it was conversely stated in the case cited that the Department would disturb such a determination upon a showing that "it was arrived at capriciously, arbitrarily, or without adequate knowledge of the existing conditions."

While the Department would not attempt to state precisely under what circumstance it would refuse to support a determination arrived at by the Grazing Service with respect to a determination of whether or not land or water should constitute base property, it would appear that in any circumstance like the present, wherein there is water which was the sole water serving an area of Federal range during the priority period, and which range cannot now be utilized to any appreciable extent without the use of such water, and no licensee outside of the one controlling the land on which the water is located can legally enjoy access to the water, the failure to consider such water as base property when other waters in the district are so considered is arbitrary to the point where it constitutes reversible error. Also, while there is no indication that there was a lack of knowledge of existing conditions, it would appear that such conditions have not received adequate consideration.

The evidence that the Anderson water is the only water of any importance available for the use of livestock grazing on the Federal range south of the 1,240-acre tract to the point above the White Cliffs, shown on the map submitted with the case (Government Exhibit A) as Burned Cedar Point, is clear and unequivocal. The record shows that this area is serviced only by the Anderson water, Willow Spring and possibly Trough Spring. G. D. McDonald, a member of the advisory board, testified that during the priority period the Anderson water was "practically the only water in the area." (Tr. 80.) He also testified that since the priority period there have been some additional waters developed in the area, but that such developments are of little importance. He stated that the livestock operators in the area have considered the Anderson water as being the controlling factor of the range in question, that it has watered more livestock than any other water north of the White Cliffs, and that in the entire area any use of the range by more than 25 or 30 head of livestock

would necessarily require access to the Anderson water in order to exist. (Tr. 74.)

Linford Harris, a resident of Glendale, Utah, who has herded sheep in the area for the past 10 years, stated that during the summers of 1936 to 1939, inclusive, he herded sheep for Anderson, that these sheep were watered at the Anderson water, and that there was no other water that the sheep could use at that time. (Tr. 90, 91.) He stated that, prior to 1938, Willow Spring would not furnish water for more than 20 sheep in 24 hours (Tr. 91), that there were no troughs or facilities at Willow Spring for watering livestock, and that the only water which was available was that which would seep up in the muddy cow tracks. (Tr. 91.) He also stated that at the present time not more than 35 or 40 cattle could water at Willow Spring. (Tr. 92.)

It appears that the main supply of water from Willow Spring is carried by pipe line south to a point below the White Cliffs and only such overflow or seep as is present is available for livestock.

Odell Anderson testified that Willow Spring is only a seep which watered five or six head of livestock and that the main body of the water is piped to the area below the White Cliffs. (Tr. 104.)

The record is lacking in definite information regarding the amount of water at Trough Spring and its present availability. However, Trough Spring is approximately five miles on a straight line from the range in question and probably seven miles by the course livestock would have to travel going to and from the spring. Thus the water from this spring can probably be disregarded as an influence on the use of the range in question.

Furthermore, it appears that, irrespective of the value Trough Spring may now have as a source of water, it was of little or no value during the priority period. (Tr. 76.) In this connection the witness G. D. McDonald testified that, during the priority period, Trough Spring was merely a seep and would water only a few head of cattle. (Tr. 73.)

The record indicates that Trough Spring has recently been improved and developed, but the results of such work are not disclosed. However, this would be of no importance, for water developments since the priority period cannot affect the rating which a water should receive; otherwise licenses or permits based on water would be extremely unstable and subject to defeasance by subsequent water developments.

There is no testimony or evidence whatever which casts any doubt on the probity of the testimony regarding these waters, and thus it may safely be assumed that the Anderson water is the only water of any importance which serves the area of range in question, or which

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served it during the priority period. Thus no reason is apparent why the water should not be considered as base property.

Particularly is this true when it is recognized that waters have been considered as base property at other points in the district.

Accordingly, the Department feels that it must hold that the failure of the district grazier and the examiner to have considered the Anderson water as base property is reversible error.

This conclusion having been reached, there appears to be no necessity for treating a number of assignments of error which are listed in the appeal. However, it is felt that some attention should be given to the question of whether or not the party who controls the Anderson water and obtains a license based thereon should be permitted to graze the livestock of others under such a license. It is the conclusion of the Department that there is nothing in the rules and regulations of which such a procedure would constitute a direct violation.

It is recognized that there are oftentimes substantial fluctuations in the size of the herds which various operators own, and that it is not practical or advisable in most areas for licenses to be reduced or increased to meet these constant fluctuations. Furthermore, at least at the present time, the Department would be hesitant to condemn a practice which, in the present case at least, would appear to offer a medium of conservation of agricultural labor. Accordingly, unless other factors are present which do not appear from the record, it is felt that, if there are excess grazing privileges over and above those which can be used by the licensee, there should be no objection to the utilization of such privileges by allowing the livestock of others to be grazed with those of the licensee.

One further point requires discussion. As may be seen by a reading of the earlier parts of this decision, both of the appellants have somewhat confused the record by failing to present a clear picture as to which of the two has control of the 1,240-acre tract and the waters located thereon. The Federal Range Code provides for the issuance of licenses to "applicants owning or controlling land * * * or * * * water * * *," and thus does not permit the granting of licenses to persons who are unable to show such ownership or control. In the present case it appears that Anderson has the primary ownership and control of the 1,240-acre tract. However, control of the entire tract has purportedly been transferred to the Watsons by virtue of the 3-year lease which is with the record. Also, the Watsons have executed the above-mentioned "Transfer of Grazing Privileges." Thus it cannot be determined with certainty which of the appellants actually has control of the property.

The Grazing Service should not be required to adjudicate applications wherein the showing of ownership or control of the base property is so indefinite. In such instances it is within the authority of the Grazing Service to withhold the issuance of such a license until ownership or control has been satisfactorily shown.

Accordingly, notwithstanding the fact that the Anderson water is to be considered as base property, no license should be issued until such ownership or control has been clearly and unequivocally shown. In this connection attention is also directed to the provisions of the second sentence of paragraph (a) of section 7 of the Federal Range Code of 1942.

The decision of the examiner is modified as above indicated.

Modified.

UNITED STATES v. UNITED STATES BORAX COMPANY

Decided April 28, 1943

Motion for Rehearing decided July 31, 1944

PUBLIC LANDS—DEPARTMENTAL PROCEDURE—RES JUDICATA—WITNESSES.

The principle of *res judicata* has no application to proceedings in the Department relating to disposition of the public domain until legal title passes, and findings and decisions are subject to revision in proper cases. Where an expert witness in a former proceeding subsequently changes his opinion on a material issue of fact, the determination of which is entirely dependent upon the reasoning of such experts, another hearing may be ordered.

APPEAL—EVIDENCE.

Professional papers and bulletins reflecting the opinions of their author on the sodium deposits in dispute, but not offered in evidence before the register, may not be considered as evidence on appeal.

MINERAL LANDS—MINERAL LEASING ACT OF 1920—TEST OF APPLICABILITY.

In determining whether land was of known mineral (sodium) character, as contemplated by the Mineral Leasing Act, and, therefore, excepted from location and disposition under the mining laws, all that is required is that such competent evidence show that the lands were known to be valuable for sodium when the attempted location under the mining laws was made, that is, that the known conditions at that time were such as reasonably to engender the belief that the lands contained sodium borates in such quantity and of such quality as would render their extraction profitable and justify expenditures to that end.

MINERAL LANDS—MINING LAWS—MINERAL LEASING ACT OF 1920.

Adverse proceedings directed by the Government against the mineral entry of the United States Borax Company. *Held*, (1) that the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 24, T. 11 N., R. 8 W., S. B. M., embracing the Little Placer claim, contains valuable deposits of sodium borates; (2) that the said sodium borate materials, to wit, tincal and kernite, are soluble in water and were dissolved in water, and accumulated by concentration; (3) that

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at the time the appellant perfected its mining location on the lands embracing the Little Placer mining claim the lands were known to contain valuable deposits of sodium borates; (4) that the lands embracing the Little Placer mining claim or the sodium borates therein contained are not subject to disposition under the general mining laws but only under the act of February 25, 1920 (41 Stat. 437, 30 U. S. C. sec. 181), known as the Mineral Leasing Act.

PRACTICE—NEW TRIAL—INFORMALITY IN PROCEDURE.

Motion for new trial submitted after appeal to the Secretary comes too late under the regulations (43 CFR 221.41–221.44) but will be considered on its merits under the ruling in *United States v. State of California*, 55 I. D. 532.

PRACTICE—GROUNDS FOR REHEARING.

No proper ground for rehearing is offered by the presentation of cumulative evidence which, if proved, would warrant no change of decision, and as to which there is no showing that with due diligence it was impossible to present it at the hearing.

PRACTICE—MOTIONS FOR REHEARING.

Motions for rehearing should be filed within 30 days after receipt of notice of the decision complained of (43 CFR 221.81) and the filing of supplements thereto after that time is not contemplated.

MINERAL LEASING ACT OF FEBRUARY 25, 1920 (41 STAT. 437)—CONTEST CHARGES AGAINST CONFLICTING PLACER CLAIM—FINDINGS AND CONCLUSIONS BASED THEREON.

A charge to the effect that a sodium borate deposit prevented a location being made under the mining laws, necessarily meant that the deposit was of the type contemplated by the Mineral Leasing Act. Findings and conclusions based on contest charges are to be read together in a reasonable manner.

PROSPECTING PERMITS—SEGREGATIVE EFFECT.

Mining claims cannot be located on land covered by an oil and gas prospecting permit which, until canceled of record, segregates the land from location under the mining laws.

MINING CLAIM—NECESSITY FOR CONTEST.

Where official records of General Land Office show mining claim void from its inception because of conflict with outstanding prospecting permit, no contest on that ground is required. 43 CFR 221.1, 222.14.

CHAPMAN, Assistant Secretary:

This is an appeal by the United States Borax Company from the decision of the Commissioner of the General Land Office of November 21, 1941, holding for cancellation mineral entry 045946 for the Little Placer, covering the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 24, T. 11 N., R. 8 W., S. B. M., Kern County, California.

The Little Placer was located August 11, 1926, by the Borax Company. Drilling was commenced in August 1927, and stopped upon discovery of calcium borates at a depth of 907 feet on September 2,

1927. Application for patent was filed August 8, 1928. At this time there was pending before the General Land Office the application of the Burnham Chemical Company, No. 045676, filed June 1, 1928, for a sodium prospecting permit, covering the lands in question and other lands, under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437), section 23 of which at the pertinent times here involved provided:

That the Secretary of the Interior is hereby authorized and directed, under such rules and regulations as he may prescribe, to grant to any qualified applicant a prospecting permit which shall give the exclusive right to prospect for chlorides, sulphates, carbonates, borates, silicates, or nitrates of sodium dissolved in and soluble in water, and accumulated by concentration, in lands belonging to the United States for a period of not exceeding two years: * * *.

On November 23, 1928, the General Land Office directed a hearing of the issues between the Chemical Company and the Borax Company and others to determine whether the Little Placer lands and others were valuable for sodium in any of the forms described in the leasing act of 1920, and were known to be such on the dates the respective placer mining locations were made. The Government intervened.

As a result of that hearing the register found in effect that borate of sodium had not been discovered upon the Little Placer, inferentially found that no other sodium compound had been discovered, and held that the discovery of calcium borate in the form of colemanite was sufficient to validate the claim of the Borax Company. The General Land Office affirmed the register and also held that the claim was valid. It found that the calcium borates were discovered first and without actual knowledge at that time by the claimant of the existence of underlying deposits of sodium borate in the form of kernite.

Upon appeal by the Burnham Chemical Company, the Department on March 8, 1933 (54 I. D. 183), affirmed the decision of the General Land Office. With respect to the Little Placer it was held (1) that only valuable deposits of calcium borates in the form of colemanite and ulexite, subject to location under the mining laws, were actually found in commercial quantities, and (2) that because the sodium borate in the form of kernite, discovered in adjacent claims and known to underlie deposits of calcium borates therein, was not within the purview of section 23 of the leasing act, not having "accumulated by concentration," it became immaterial whether the Borax Company had knowledge that the kernite found

* This section was amended by the act of December 11, 1928 (45 Stat. 1019; see 30 U. S. C. sec. 261).

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in the adjacent properties also existed beneath the deposits of colemanite and ulexite in the Little Placer.

Following the Department's decision, final certificate covering the Little Placer was issued on August 1, 1933, containing the usual recitals that upon presentation of the certificate to the General Land Office, together with the plat and field notes of survey of said claim and the proofs required by law, patent would issue, if everything were regular, and the further recital that patent would be withheld by the General Land Office pending a report by the Special Agent in Charge upon the bona fides of the claim.

The issuance of patent on the Little Placer was, however, suspended on May 19, 1937, and the Government directed adverse proceedings against the mineral entry on the following charges:

1. That the land contains valuable deposits of sodium borate.
2. That such sodium borate deposits were dissolved in and soluble in water and accumulated by concentration.
3. That while the location was made August 11, 1926, a discovery was not made thereon and the claim validated until in September 1927, at which time sodium borate deposits were known to exist in the land which prevented a location being made thereon under the mining laws.

The Borax Company filed an answer wherein it in substance admitted that the probabilities were that the land contained valuable deposits of sodium borate, but alleged that the existence of such deposits in the land, while highly probable, had not yet been actually demonstrated; denied that such sodium borate deposits were dissolved in or soluble in water and accumulated by concentration; admitted that the calcium borate location was made on or about August 11, 1926, and that a valid discovery was made in September 1927; denied that sodium borate deposits were known by it to exist in the claim at any time on or before September 1927, and alleged by supplemental answer that all the matters and things set forth in the charges had been fully tried and adjudged in its favor by the Department in *Burnham Chemical Company v. United States Borax Company, et al.* (54 I. D. 183, March 8, 1933), and that therefore all of the said issues were *res judicata* as far as the Government was concerned.

A hearing was held before the register from February 23 to March 4, 1938. After denying a motion to dismiss the contest on the ground of *res judicata*, the register concluded that the Government had sustained all three of its charges. On appeal, the Commissioner of the General Land Office decided that the plea of *res judicata* was properly denied by the register; that the land was known to contain valuable deposits of kernite and tincal on and prior to September

1927, and that kernite and tincal are minerals comprehended by the phrase "borates * * * of sodium dissolved in and soluble in water, and accumulated by concentration" as used in section 23 of the 1920 leasing act. Accordingly, he held the Little Placer mining claim for cancellation. From that decision the Borax Company appeals.

The contentions of the appellant are substantially these: 1. That this proceeding is barred under the rule of *res judicata* and that a change of opinion by an expert witness does not justify its commencement. 2. That professional papers and bulletins of the Government not offered in evidence may not be considered in deciding the issues. 3. That actual discovery of sodium borates in the Little Placer is essential to establish knowledge of their existence. 4. That the evidence preponderates in favor of the conclusion that the sodium borate deposit was not one "dissolved in and soluble in water, and accumulated by concentration."

1. The appellant challenges the right of the Government to retry and redetermine issues decided in the *Burnham* case. Its position is that the principle of *res judicata* should be a bar to such action. This approach fails to take into account the nature of the Secretary's power over the public domain and the proceedings in the Department relating to it, a power quite different than that of the courts in adjudicating rights as between private parties.

The Secretary of the Interior has a continuing duty as guardian of the public lands. He loses this power and his jurisdiction ends only when the Government no longer has legal title. Thus, in dealing with those who claim or apply for an interest in public land, so far as the Government is concerned the Secretary's decisions are not controlled by the principle of *res judicata*. His first duty is to see that the public domain is conserved, managed and disposed of in the manner Congress has directed. And while he has jurisdiction over the land, he may open any proceeding and correct or revise or reverse any decision of the Department or the General Land Office provided interested persons in appropriate cases have notice and opportunity to be heard. Before the passing of legal title, his findings and decisions are as completely subject to revision as are those of a court before final judgment or before the end of its term.

The important aspects of the Secretary's power in this regard are that it is primarily a power over lands and that all proceedings with relation to any particular public land are merely steps in a continuous proceeding *in rem*, never finally terminated until legal title passes. These principles are designed most effectively to subordinate private convenience to the safeguarding of the public domain. And they

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have been established and applied by many decisions of the Department and the courts.¹

In this case a patent has not issued. Notice of the charges made in this proceeding was duly given to the appellant. In due time it filed an answer and an amended answer and extensive hearings followed. The Secretary, therefore, had the power to reopen the issues heard in the *Burnham* case, and to revise any findings or conclusions there made.

Moreover, the exercise of the power in this case was especially appropriate. The Secretary should be especially astute to ascertain all the facts in a case of this kind by exhausting all sources of evidence and by guarding against any substantial error before authorizing the issuance of patent, for the ultimate issue is whether the Secretary has the power to lease the land under the leasing act or permit a disposition of the full title under the general mining laws. This issue is important because, if the disposition is to be under the general mining laws, the United States will lose all title and proprietary control to both the surface and subsurface, while if it is to be under the leasing act the fee will be retained by the Government and only a mineral permit or lease will issue. In addition, in section 23 of the 1920 leasing act, Congress in effect placed upon the Secretary the duty of determining a peculiarly technical, not easily demonstrable fact, namely, whether in addition to being "dissolved in and soluble in water," the compounds of sodium there enumerated were "accumulated by concentration."

The basis for doubting the correctness of the decision in the *Burnham* case was the fact that Gale, in that proceeding one of the expert witnesses for the defendants, had subsequently changed his opinion on this very question, the determination of which in this case depended entirely on the deductive reasoning of geologists. This was reason enough in the circumstances for ordering another hearing. Cf. *Van Epps v. McKenny*, 189 N. Y. Supp. 910. If, as a result of such a new hearing, it would appear that the origin of the deposit was syngenetic, i.e., that described in section 23 of the 1920 leasing act, rather than epigenetic, then the question whether kernite was known to exist in the land at the time of the alleged discovery of colemanite would become material, a question, which, in view of the

¹ *West v. Standard Oil Co.*, 278 U. S. 200, 210-214; *Knight v. Lane*, 228 U. S. 6; *Greenmeyer v. Coate*, 212 U. S. 434, 442; *Michigan Land and Lumber Co. v. Rust*, 168 U. S. 589, 592, 593; *New Orleans v. Paine*, 147 U. S. 261, 266; *Knight v. U. S. Land Association*, 142 U. S. 161, 178; *Whitten v. Read*, 53 I. D. 453, 466; *Ernest B. Gates*, 41 L. D. 384; *Brooks v. McBride*, 35 L. D. 441; *Northern Pacific R. R. Co. v. Coffman, et al.*, 24 L. D. 280; *Littlepage v. Johnson*, 19 L. D. 312, 314; *National Rifle Ass'n v. Young*, 134 F. (2d) 524, 77 App. D. C. 290; see 27 *Michigan Law Review* 804.

contrary assumption in the *Burnham* case, had there been considered immaterial. (54 I. D. 183, 189.) True, there was some testimony on this issue in the earlier hearing. But if the finding on origin were to be reversed, the issue would assume new significance. Hence, it would not only be fair to both the appellant and the Government to permit again the taking of testimony on that issue but would resolve whatever doubt persisted.

It follows that the plea of *res judicata* is no bar to this proceeding and that the exercise of the discretionary power to reconsider the issues was appropriate and reasonable.

2. Certain recent professional papers and bulletins published by the Geological Survey and prepared by Waldemar T. Schaller, one of its geologists, having direct reference to the sodium deposits in dispute but not offered in evidence before the register, were referred to and considered by the Commissioner on the theory that they could be judicially noticed. The writings were opinions of the author on the origin and nature of the sodium deposits. Constituting no part of the record in the hearing before the register, and the defendants not having been afforded an opportunity to rebut them, the papers should not have been considered as evidence on appeal. *Robinson v. Balt. & Ohio R.R.*, 222 U. S. 506, 511, 512; *Ohio Bell Telephone Co. v. Public Utilities Commission of Ohio*, 301 U. S. 292, 302; *Chisholm-Ryder Co. v. Buck*, 65 F. (2d) 735, 737; *Richard P. Ireland*, 40 L. D. 484. However, the error was not prejudicial if the findings are otherwise supported by substantial evidence in the record. *Cf. Interstate Commerce Commission v. Louisville and Nashville Railroad Co.*, 227 U. S. 88, 93, 94. In view of our conclusion, hereafter discussed, that there is substantial evidence in the record apart from Schaller's papers, to support the findings with respect to the nature and origin of the sodium deposits, the error was not prejudicial.

3. Lands which are known to be valuable for a mineral which is subject to leasing under the Mineral Leasing Act, are not open to location and disposition under the mining laws. If at the time of any attempted mining location, the land is known to be valuable for any of the leasable minerals, the attempted location is of no validity and the lands may only be leased under the leasing act. *Wilbur v. Krushnic*, 280 U. S. 306, 314; 50 L. D. 650, 651-652.

On the assumption that the sodium borate deposit here involved was of the character described in section 23 of the Mineral Leasing Act, one of the pertinent issues in the case was therefore whether the Little Placer lands were known to be valuable for the sodium borate on September 2, 1927, the date of discovery by the appellant of calcium borate, a mineral not included in the leasing act.

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The evidence adduced abundantly shows that kernite and tincal (sodium borates) were discovered in lands adjoining the Little Placer on the northeast (NE $\frac{1}{4}$ Sec. 24, Baker Mine) in August and December of 1926, and in lands adjoining on the south and southwest (SE $\frac{1}{4}$ and SW $\frac{1}{4}$ Sec. 24, Western Mine) on July 4, 1927, in drill holes very close to the southern and western boundary lines of the Little Placer; that the appellant became the owner of the Baker mine prior to discovery of colemanite in the Little Placer claim; that the discoveries of kernite in the Baker and Western mines became a matter of common knowledge in the community immediately after the discoveries were made; that the Baker and Western deposits are very similar and in one category; that the deposits are uniquely and surprisingly pure and of great thickness, 90 to 100 feet; that the thickest parts of the Western deposit are right near the center of Section 24 and continue northward in maximum thickness within 2 $\frac{1}{2}$ to 5 feet of the boundary lines of the Little Placer, and, in the opinion of two witnesses called by the appellant, under two or three acres of the Little Placer; and that the Baker deposit is the major deposit and the principal source of borax at the present time. The appellant in speaking of the Little Placer admitted in its answer that "the probabilities are that the land contains valuable deposits of sodium borate." It also appears that the appellant drilled for borate minerals in the Little Placer after its officials knew that valuable deposits of sodium borate had been discovered on adjacent lands.

The appellant contends that this evidence is not enough but that proof of an actual discovery of the sodium borate deposit was required. The settled rule is to the contrary. Proof of the existence of the mineral on adjacent lands, geological and other surrounding and external conditions are competent. All that is required is that such competent evidence show that the lands were known to be valuable for sodium when the attempted location under the mining laws was made, that is, that the known conditions at that time were such as reasonably to engender the belief that the lands contained sodium borates in such quantity and of such quality as would render their extraction profitable and justify expenditures to that end. *United States v. Southern Pacific*, 251 U. S. 1, 13, 14; *Diamond Coal and Coke Co. v. United States*, 233 U. S. 236, 249; *United States v. Standard Oil Co.*, 21 F. Supp. 645, 650, 651, aff'd *Standard Oil Co. v. United States*, 107 F. (2d) 402, 411, 414, 415, cert. den. 309 U. S. 654; *United States v. California*, 55 I. D. 121, 130. Within this rule, the evidence is convincing that the lands embraced in the Little Placer were known to be valuable for sodium borate when the appellant made its attempted location.

4. In the second charge of the Government, the issue was whether the sodium borate materials composing the kernite and tincal beds had "accumulated by concentration," that is, had been syngenetically deposited, as provided by section 23 of the Mineral Leasing Act. If not, the appellant contends the Mineral Leasing Act is no bar to the issuance of a patent under the general mining laws. The Commissioner and the register found as a fact that the sodium borates had accumulated by concentration. The appellant assigns many errors in weighing and appreciating the evidence.

In the particular locale, known as the Kramer District, there are three known deposits of sodium borates located within a mile of each other in a synclinal basin surrounded by hills and known locally as the Suckow, Baker and Western; the Suckow deposit being a short distance east of the northwest corner of the NE $\frac{1}{4}$ of Sec. 23 and extending into the SW $\frac{1}{4}$ SE $\frac{1}{4}$ of Sec. 14; the Baker deposit being in the northeast corner of the NE $\frac{1}{4}$ of Sec. 24, and the Western deposit being at and south and west of the center of Sec. 24, all in T. 11 N., R. 8 W., S. B. M.

In the Suckow and Baker mines the ceilings of the sodium borate beds are from 350 to 400 feet below the surface and about 800 feet below the surface in the Western mine. All three mines contain tincal but kernite is found only in the Baker and Western mines. The difference in chemical composition between tincal and kernite is of no significance except as it may reflect on the manner of deposition. Both are soluble in water.

The syngenetic theory is confined to lacustrine deposits where the ores and shales are laid down geologically at the same time in alternating symmetrical laminations of varied respective thicknesses. The epigenetic theory is confined to a process whereby the ores in solution are forcefully introduced into preexisting shales.

In speaking of the depositional characteristics of the Suckow and Western deposits, Gale, the geologist now called by the Government, said in substance, that the sedimentary banding of the Suckow deposit, the parallelism of the layers, the layering of the borax crystals and their orientation in the layers indicate that they crystallized at the bottom of an open body of water and that the alternating layers were quite regular and consistent; that in the Western mine the alternating layers were not quite so regular but the same sort of thing existed though less clearly defined and that this stratification in the Western mine stood out quite clearly as shown in a picture of it appearing in United States Geological Survey Bulletin 871, opposite page 99; that the lower half of the picture marked B showed the stratification in which the continuity and parallelism of

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the shale and ore beds in the Western mine had been largely preserved.

In speaking of the depositional characteristics of the Suckow and Western mines, Dr. Buwalda, a geologist called by the appellant, said in substance, that the Suckow deposit is much more regularly stratified; that the beds of shale are of more constant thickness, the regularity in bedding, the successive deposition of shale and borate material occurred more regularly, that is, there are perhaps two inches of borate and then perhaps a half inch or an inch of shale and that will be repeated again and again in much more regular form than in the case of the Western deposit; that the layers of borate in the Western deposit are not of even thickness and are swollen in some parts and buckled in others; that parts of the shale layers indicate that they have been dissolved away; that vertical, oblique and horizontal veins cut the deposit frequently; that the borates are not stratified in the way it might be expected if they had been laid down as a sedimentary deposit; that the layering is very vague and that the deposit is uniquely and surprisingly pure although there are shale layers between the borate layers with very little foreign material.

Palmer, a mining engineer called by the appellant, in describing the Western deposit testified, in effect, that frequently shale is included in the crystals of kernite and frequently surround the crystals of kernite; that the crystals sometimes are very large, some of them a foot in diameter and a couple of feet long with specks and little gobs and large chunks of shale inside of them; that there are parallel shale beds pushed apart and shale beds with a layer of ore between them; that the shale beds are parallel for a little way, then they swell apart with increased thickness of the ore, and then they will be found broken and in places the whole bed will be broken.

In describing a sedimentary or playa lake deposit, Dr. Buwalda, in substance, testified that before there is a basin in a desert region there are mountains so that some part of that area stands high and sheds drainage to adjoining lowlands; that if the rainfall is so small that lakes of "ordinary times" do not develop with through drainage there will be at the bottom of the basin what is called a playa, into which goes drainage out of the surrounding ranges and materials swept off the adjoining ranges; that in the bottom of the basin the salts that are brought down from the surrounding mountains, dissolved out of the rocks, are carried down into the lower part of the basin and when the water in the basin evaporates they are left behind and come to be interstratified with the shales; that these series of sediments continue to build up thicker and thicker and in some cases

reach the aggregate thickness of thousands of feet with successive layers of material; that ordinarily there are not huge concentrations but there are exceptions to that to be sure; that the tendency is for the saline to become interstratified with the mud in thin layers with different distributions, some of them reaching to the right and some to the left or east and west of the basin and that is why there are scattered distributions of the saline deposits throughout the section; that there are many of these in the desert region but no two exactly alike; that Searles Lake is a typical deposit in some respects but not in others; that the water was carried into that basin from the Owens Valley region and evaporated there from time to time giving rise to a large salt body; that the thickness of the crystal body is scaled something like 70 feet and the area is something like 10 to 12 square miles, the playa lake being very much larger, having an area of 50 or 60 or 70 square miles.

Also Leroy A. Palmer, a witness called by the appellant, testified, in effect, that he had examined deposits "carrying minerals that dissolve in and are soluble in water and accumulated by concentration," and that Searles Lake was such a deposit. And witness C. M. Razor for the appellant testified to the same effect. Likewise did Gale.

The description as given of a lacustrine deposit of salines and the testimony that Searles Lake is a typical lake deposit, with an ore body something like 70 feet thick, when compared carefully with the striking similarity of laminas of shales and sodium borates in the Suckow mine and also in the Western mine but with less regularity, with thick ore bodies in each, and the antitheses which spring from the epigenetical characteristic indications advanced by the appellant, lend great strength to the proposition that originally the Suckow, Western and Baker deposits were laid down syngenetically.

The appellant points to many physical occurrences which it claims indicate the epigenetic deposition of the Western ore body, all of which may be included in the following designations: 1. Absence of other salts and foreign impurities. 2. Veins in the deposit. 3. Partial dissolution of the shales and angular fragments of shale within the tincal and kernite. 4. Distortion of the shales, uneven thickness of shales, swollen and buckled shales and vague layering of borates and shales. 5. Presence of realgar, orpiment and stibnite. It is not believed, however, that these physical occurrences, in the light of all other evidence on the origin of the sodium borates, have much probative force.

As to the first, it is significant that there are crystals of borate minerals in all three deposits of divers sizes and of different degrees

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of purity. Buwalda, after stating that the deposit in the Western mine is uniquely and surprisingly pure, asserts that there are exceptions. Hence, it is admitted that sedimentary deposits of water-soluble saline minerals may vary greatly in their purity. This western deposit might well be an outstanding sedimentary exception. He further states, in substance, that it is difficult to conceive of beds 10 feet or so in thickness being laid down as a sedimentary deposit and not containing considerable quantities of clay, sand, gravel and detritus swept into the basin from the side during the many years that would be necessary for the deposition of layers of that thickness. But he does not say that such a deposition is impossible or could not be an exception consistent with the acknowledged fact that no two sedimentary deposits are alike. This Western deposit in its entirety, that is everything between its ceiling and floor, appears from the evidence in the case to be about one-fourth layers of clay and other impurities, the clay, of course, being nothing more than the eroded rocks, which originally surrounded the synclinal basin, deposited in water and compacted in shaly layers.

With respect to the vertical, oblique, and horizontal veins mentioned, they seem to be those occurring in the shale and in the ore body between the ceiling and the floor of the ore body. The mere presence of veins which cut the layers of ore and shale layers within the body of the deposit is not convincing evidence of the epigenesis of the deposit in view of the many ways in which the deposit and the shale layers in it could have been distorted.

The partial apparent dissolution of shales and the presence of angular fragments of shale within the tincal and kernite can be amply explained, it is believed, by a recrystallization of original tincal into kernite accompanied by fracturing and resultant local dislocations.

The evidence discloses that the distortion present in the Western mine could have happened in many ways. The scientists are not in accord on the question of whether tincal ($\text{Na}_2 \text{B}_4 \text{O}_7 \cdot 10\text{H}_2 \text{O}$) or kernite ($\text{Na}_2 \text{B}_4 \text{O}_7 \cdot \text{H}_2 \text{O}$) was the primary mineral. The chemical difference between tincal and kernite is six molecules of water. If tincal was the primary mineral, which must be the case in the Suckow mine, a large decrease in space would have occurred in the Western and Baker mines when it changed to kernite. Witness Connell testified that the decrease would equal 40 percent of the size of the deposit. If kernite was the primary mineral then naturally there would have been a swelling in equal proportion when it changed to tincal. There are no indications of such swelling or any distortions in the Suckow mine in which there is no kernite.

All of the distortion, therefore, in the Western mine could have taken place, in geologic time, while the change from tincal to kernite was in progress. Such a change would take place very slowly. It would not be instantaneous, leaving theoretical empty spaces, but the slow diminution in volume would be taken care of immediately but at the same slow rate by the compressive force to which the whole deposit would be subjected at all times. The evidence evinces the fact that the distortion of the shale layers is found around kernite crystals and in runs of shale measured in inches instead of hundreds of feet, whereas folding due to the introduction of new molten material forcing the strata apart, it is believed, would involve folding for distances hundreds of feet in length and generally would be continuous and curved instead of short, fragmental and straight-edged. Where molten material is brought up from the depths through a feeder vein, and is diverted in a horizontal direction with the consequent displacement of the intruded body, shale, the resulting pressures must essentially be up or down. A downward bulging of the shale layers would encounter the resistance of the entire earth below, whereas an upward bulging would encounter only the resistance of the overlying material. If the downward bowing of the shale layers shown in Buwalda photo exhibit No. 17 (p. 76, appellant's brief) is due to the injection of kernite then that downward bowing had to overcome the resistance of the entire earth, whereas the upward bowing would overcome only the resistance of the overlying strata at the time the kernite is supposed to have been injected, which at the present time is about 800 feet. Further, the swelling and buckling and distortion of the shales could be attributed to some extent at least to the growth of kernite crystals. Dr. Buwalda in this regard testified, in substance, that crystals begin to grow around certain centers and the pressure which they exert as the consequence of their growth is in many cases very large and that, if the deposit formed happens to lie in an inclined or horizontal position, the growth of the crystals will actually force the overlying territory and lift it in such a way as to make more space for the crystals to grow beneath and between the walls of a deposit. Distortion thus brought about would develop cracks and cross fractures in the shales and the partial elimination of lamina regularity, the cracks and cross fractures being later filled with borate material by moving solutions.

Finally, it is shown by the evidence that realgar, orpiment and stibnite may come from volcanic activity. However, it is scientific knowledge that boron emanates from volcanic vents and that sodium dissolved from the surrounding rocks and lava beds will readily

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unite with the boron. It is therefore reasonable to believe, and it can be deduced from the evidence presented, that the small amounts of realgar, orpiment, and stibnite found to be present could have accompanied any boron placed in the lake through volcanic vents. Gale testified to the presence of realgar in Searles Lake, admitted to be a sedimentary deposit.

The views of the experts are divergent on whether tincal or kernite was the original mineral. Dr. Buwalda when asked if his opinion took care of the deposition of both tincal and kernite equally well, replied that he did not think so and would hesitate to express a very definite opinion on that score. And after a presentation of his views and conclusions in support of the epigenetic theory, gained from what personal examination he could make of the geologic formations exposed in the mines and deciphering the geologic history of the region in detail and at great length, he could conclude with no greater assurance than "it is only reasonable to assume that these borate bearing solutions should come up from depths in this particular region in the form of ascending solutions." Ransome was of the view that there were four ways that it may have crystallized in the soft mud at the bottom of a tertiary lake whose waters were rich in sodium borate. Gale was of the same view.

The evidence is persuasive that tincal, present in all three mines, was the primary mineral; that the Suckow mine constitutes the prototype from which it may be concluded that the other two deposits originated, and, as the Suckow mine closely meets the distinctive characteristics of a lake deposit, that the component materials (sodium borates) were deposited syngenetically.

While there is no evidence of actual discovery of sodium borates within the boundaries of the Little Placer claim, the admission of the appellant in its answer and brief that "the probabilities are that the lands contain valuable deposits of sodium borates," the evidence of the actual discovery of those minerals in adjacent and nearby lands, and the evidence of other surrounding and external conditions, amply support the Commissioner's finding that valuable sodium borates of the character described in section 23 of the Mineral Leasing Act actually underlie the lands of the Little Placer claim.

The Department finds and concludes:

1. That the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 24, T. 11 N., R. 8 W., S. B. M., embracing the Little Placer claim, contains valuable deposits of sodium borates.

2. That the said sodium borate materials, to wit, tincal and kernite, are soluble in water and were dissolved in water, and accumulated by concentration.

3. That at the time the appellant perfected its mining location on the lands embracing the Little Placer mining claim the lands were known to contain valuable deposits of sodium borates.

4. That the lands embracing the Little Placer mining claim or the sodium borates therein contained are not subject to disposition under the general mining laws but only under the act of February 25, 1920 (41 Stat. 437, 30 U. S. C. sec. 181), known as the Mineral Leasing Act.

The decision of the Commissioner is

Affirmed.

MOTION FOR REHEARING

The United States Borax Company has filed a motion for rehearing of the appeal and for a new hearing for the purpose of taking additional testimony. In its decision of April 28, 1943, the Department affirmed the Commissioner's decision that the 10 acres of land covered by the Little Placer mining claim were subject to lease and not to mining location because they contained sodium borate "dissolved in and soluble in water and accumulated by concentration," as provided in section 23 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 447).

1. The appellant again disputes the right of the Government to retry and redetermine the issues decided in *Burnham Chemical Company v. United States Borax Company, et al.*, 54 I. D. 183. Nothing new is now presented. The point was fully considered and discussed and decided against the appellant in the Department's decision. We need only paraphrase the language of the Supreme Court by saying that the appellant's reiterated argument is "that upon the creation of an equitable right or title" in it, "the power of the land department to inquire into the validity of that right or title ceases. That proposition cannot be sustained." *Brown v. Hitchcock*, 173 U. S. 473, 479. See also *Peyton v. Desmond*, 129 Fed. 1, 7, 8.

2. The Department found as facts, (1) that the sodium borate materials contained in the lands involved are soluble in water and were dissolved in water and accumulated by concentration, and (2) that at the time the appellant perfected its mining location the lands were known to contain valuable deposits of these sodium borates. On this motion, these findings are challenged. No record evidence and no arguments based thereon, which were not considered or presented on the appeal, are now called to our attention. The entire record was considered in determining the appeal and it has now

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again been reviewed. We see no reason for disturbing the findings made in the decision on appeal.¹

3. Appellant has submitted the affidavits of a geologist and two chemists setting out alleged newly discovered evidence, on the basis of which it moves for a new trial. The Rules of Practice provide that motions for new trials are to be heard by the register and shall be filed with him not more than 15 days after his decision, and that such motions will not be considered or decided in the first instance by the Commissioner or the Secretary, or otherwise than on review of the decision of the register. 43 CFR 221.41-221.44. Appellant's motion therefore comes too late and at an inappropriate stage of the proceedings.

These procedural objections aside,² there are other reasons for denying the motion. The appellant has failed to demonstrate that the alleged newly discovered evidence could not with due diligence have been obtained before and presented at the hearing; most of it is cumulative; and none of it is controlling, that is, proof of any or all the alleged new facts at a new hearing would not warrant a change in the findings of fact of the register, the Commissioner and the Assistant Secretary that the deposits accumulated by concentration.³

With respect to two of the suggested items of "new" evidence, this further comment should be added. (1) It is said that ammonia, which is characteristic of volcanic deposits, has been detected in kernite samples of nearby mines. The affidavit of Dr. Buwalda, a geologist, states that "considerable amounts" of ammonia are present in the kernite deposits and refers to the accompanying affidavit of Dr. Swift, a chemist. The latter affidavit, however, states that on actual analysis of 14 samples from nearby mines, 3.6 to 10 parts of ammonia per *million* were found. Reducing this to the customary percentage basis and conceding the maximum claimed, appellants say that .001 percent of ammonia was detectable in the samples. This is an infinitesimal rather than a "considerable" amount and in such minute quantities may be attributed to innumerable processes, such as the decomposition of organic matter, rather than the epigenetic origin of the sodium borate. (2) One of the affiants describes a laboratory experiment conducted after the hearing which allegedly indicates that, had tincal been the original ore, the change to kernite would have caused the

¹ We should point out that, as stated in the Commissioner's decision, the Geological Survey on October 25, 1928, determined, in connection with the application of Burnham Chemical Company for a sodium prospecting permit, that the lands in Sec. 24 "contain sodium salts in commercial quantities and are subject to entry only under lease."

² *United States v. California*, 55 I. D. 532.

³ See: 43 CFR 221.42. 3 Moore's Federal Practice, p. 3245, Note 14. §59.02, 1942 Supp., Note 14. *United States v. California*, 55 I. D. 532.

shale to disintegrate and no angular fragments would remain within the kernite. The temperatures used in this experiment were between 100° to 150° C. Such temperatures necessarily segregate the shales completely. Kernite is recognized as stable above approximately 60° C; therefore the change from tincal to kernite may have occurred at the lower degree with relatively slight effect on the shales. There is no possible way of knowing at what temperature, what time, or what depth, kernite was produced, but there is no basis for assuming the high temperatures of the experiment.

SUPPLEMENT TO MOTION FOR REHEARING

The motion for rehearing was filed within the 30-day period allowed by the regulations. 43 CFR 221.81. Long after the expiration of the 30-day period, the appellant filed a so-called "Supplement to Pending Motion for Rehearing and Reopening of Case." The regulations make no provision for the filing of such a "Supplement." Moreover, this proceeding has been pending since May 19, 1937, when the adverse proceedings were initiated. The appellant has actively and vigorously contested the Government's contentions before the register, the Commissioner and the Secretary. At this late day, the appellant for the first time contends that the thesis of the Government's charges "is that if lands within a placer mining claim contain *valuable deposits of sodium borate dissolved in and soluble in water and accumulated by concentration*, and if, at the time the location is perfected, *it is known that the lands contain sodium borate*, the location is a nullity." [Italics appellant's.] Upon this hypothesis, appellant bases an argument that there has been an error of law.

Appellant's belated conception of the Government's charges is erroneous in fact. The third charge was—

That while the location was made August 11, 1926, a discovery was not made thereon and the claim validated until September 1927, at which time sodium borate deposits were known to exist in the land which prevented a location being made thereon under the mining laws.

Obviously, the only sodium borate deposits which would prevent a location being made thereon under the mining laws, were those described in the leasing act and in the second charge as those "dissolved in and soluble in water, and accumulated by concentration." This must necessarily follow from the fact that unless the known sodium borate deposits were covered by the leasing act, they would not prevent a location under the mining laws.

The decisions of the register, the Commissioner and the Assistant Secretary can reasonably be regarded as sustaining the third charge only on the basis that it had that meaning. The register concluded

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that "charge No. 3 has been sustained." The Commissioner in affirming the register held that "The land in the Little Placer is held to contain valuable deposits of sodium borates accumulated by concentration dissolved in and soluble in water and to have been so known when the location of the Little Placer was perfected by discovery." The Department affirmed that decision. The second and third finding and conclusion of the departmental decision affirming the Commissioner were as follows:

2. That the said sodium borate materials, to wit, tincal and kernite, are soluble in water and were dissolved in water, and accumulated by concentration.

3. That at the time the appellant perfected its mining location on the lands embracing the Little Placer mining claim the lands were known to contain valuable deposits of sodium borates.

The third finding and conclusion could only sensibly mean and it was, of course, intended to mean that the lands were known to contain valuable deposits of the sodium borates described in the second finding and conclusion. In order to obviate any conceivable misunderstanding, the decision is hereby amended in the following respects: (a) The third finding and conclusion is amended to read:

That at the time the appellant perfected its mining location on the lands embracing the Little Placer mining claim the lands were known to contain valuable deposits of borates of sodium dissolved in and soluble in water, and accumulated by concentration, to wit, tincal and kernite.

(b) The last sentence of part 3 is amended to read:

Within this rule, the evidence is convincing that at the time the appellant perfected its mining location on the lands embracing the Little Placer mining claim the lands were known to contain valuable deposits of borates of sodium dissolved in and soluble in water, and accumulated by concentration, to wit, tincal and kernite.

The Smith Prospecting Permit. The General Land Office calls our attention to the fact that in any event, according to its official records, the mineral entry is subject to cancellation and the application for patent must be denied for another reason. These records show that on August 11, 1926, when the Little Placer was allegedly located, the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ sec. 24, T. 11 N., R. 8 W., S.B.M., was embraced in oil and gas prospecting permit Los Angeles 034342 issued to Ray M. Smith on March 31, 1922. This permit remained of record until March 31, 1927, when it was canceled effective May 10, 1927, because of the failure of the permittee to comply with its terms. On September 11, 1926, Smith filed a relinquishment of the NE $\frac{1}{4}$ sec. 24, but this was one month after the location of the Little Placer

claim. Moreover, the relinquishment was not accepted and the permit subsequently was canceled as aforesaid.⁴

A mining claim cannot be located on land embraced in an oil and gas prospecting permit. It is immaterial that at the date of location of the Little Placer claim the prospecting permit may have been subject to cancellation for any reason. So long as it remained of record and uncanceled, the permit segregated the land from location under the mining laws. *Joseph E. McClory et al.*, 50 L. D. 623, 626 (1924); *Filtrol Co. v. Brittan and Echart*, 51 L. D. 649, 653 (1926); *H. Leslie Parker et al.*, 54 L. D. 165, 173 (1933). Cf. *Neff v. United States*, 165 Fed. 273, 281 (1908); *Bunker Hill Co. v. United States*, 226 U. S. 548, 550 (1913); *Swanson v. Sears*, 224 U. S. 180 (1912); *Belk v. Meagher*, 104 U. S. 279, 284, 285 (1881); *Sullivan v. Tendolle*, 48 L. D. 337, 339 (1921).

For these reasons, apart from any others, the Little Placer claim was void from its inception, the entry should be canceled and the application for patent denied. As the facts supporting these conclusions are established by the official records of the General Land Office, a contest proceeding is unnecessary. See 43 CFR 221.1, 222.14; *Joseph E. McClory et al.*, and *Filtrol Co. v. Brittan and Echart*, *supra*.⁵ The Commissioner's decision is therefore to be regarded as affirmed for these as well as the other reasons heretofore assigned.

The motion for rehearing is

Denied.

AUTHORITY OF CONTRACTING OFFICER UNDER LIQUIDATED DAMAGE PROVISION OF DIVISIBLE CONTRACT

Opinion, May 14, 1943

DIVISIBLE CONTRACTS—LIQUIDATED DAMAGES—EXTENSION OF TIME—REMISSION.

A contracting officer, if circumstances otherwise warrant such action, properly may proceed to a determination to assess liquidated damages, to remit such damages if already deducted from payment, or to extend the time for performance under a divisible contract providing for the assessment of liquidated damages for delays in delivery of stenographic transcripts at specified times.

⁴The decision of the Commissioner canceling the permit stated: "Reports required under present instructions have been received, showing no objection to offering the land involved to further filing under section 13 of the leasing act. * * * As to the SW $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ [Little Placer] and S $\frac{1}{2}$ Sec. 24, above township and range, the cancellation will become effective May 10, 1927, and will be noted on your tract books at 10 o'clock a.m., on that date. Applications for permits for this land may be filed personally or by mail between the hours of nine a.m., and ten a.m., of the day the cancellation becomes effective. * * *"

⁵The appellant may, if it is so advised, file a motion for the exercise of the Secretary's supervisory power under section 221.82 of Title 43 of the Code of Federal Regulations.

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DIVISIBLE CONTRACTS—LIQUIDATED DAMAGES—EXTENSION OF TIME—UNFORESEEABLE CIRCUMSTANCES.

Illness of a contractor's chosen stenographic reporter cannot be regarded as an unforeseeable circumstance justifying an extension of time for performance or the remission of liquidated damages assessed for delay in delivery of stenographic transcripts as specified by the contract.

GARDNER, *Solicitor*:

In compliance with your [Chief Clerk] request of April 8, I have reviewed the claim of Ethel E. Fisher and Associates, Inc., and papers attached thereto, with a view to ascertaining the legal propriety of your approving, as contracting officer, the remission of liquidated damages deducted from an amount claimed by the contractor for services rendered under contract IS-4795, payment less the amount assessed for such damages having been made to and accepted by the contractor.

It is my opinion that since the contract is in form divisible, acceptance of payment for one of an anticipated indefinite number of performances thereunder would not, if the facts otherwise warranted such action, preclude allowance by the contracting officer, with the approval of the head of the department, of an extension of time covering the period of delay for which liquidated damages were assessed. However, it appears pertinent to observe that should this matter be presented in the regular course for the consideration of this office in the form of an appeal from the contracting officer's finding of fact disallowing on the merits the claim for remission of liquidated damages, I should be constrained to recommend affirmance of such a finding for the reason that the ground upon which the contractor seeks relief from assessment of damages for delay in performance is not properly cognizable under the provisions of the contract. It is manifest from the terms of the contract that it is regarded by the parties thereto as a divisible contract which is to continue for the fiscal year 1943. It is well established that if either the buyer or the seller in such circumstances has committed a material breach of contract (such as the non-delivery when promised in the present case), the other party should be excused from the obligation to perform further. If, however, the injured party knowingly accepts the defective performance, such conduct operates as an election to go on with the contract, though it does not necessarily destroy his right to recover damages for the breach committed by the other party. *Kalamazoo Ice & Fuel Co. v. Gerber* (C. C. A. 6, 1925), 4 F. (2d) 235, 240. Williston on *Contracts* (Revised Edition, 1936), secs. 700, 704, 864. Accordingly, a contracting officer could properly proceed to a determination to

assess liquidated damages for such delay or to extend the time for a particular performance under a continuing contract, such as the present one, if the circumstances warranted and such action were not precluded by a specific provision of the contract. He could so proceed even though the contractor failed to request such extension of time within 10 days from the beginning of the delay in performance. 20 Comp. Gen. 299, 302 (1940).

Inasmuch as additional requests for extensions of time under this contract, based on similar factual circumstances, have been forwarded for the consideration of this office, it is deemed advisable to review, somewhat at length, the contract provisions under which the contractor undertook to supply the services in question. The contract schedule specifically provides that—

The contractor hereby agrees *that he will at all times provide as many competent stenographers and maintain such staff and equipment as may be necessary for the prompt furnishing of satisfactory transcripts.* [Italics supplied.]

Paragraph No. 8 of the contract deletes paragraph 4 of the standard Government invitation, bid and acceptance form (U. S. Standard Form 33 [Revised]), and substitutes in lieu thereof specific liquidated damage provisions, reading in part as follows:

Delays—Liquidated Damages.—If the contractor refuses or fails to make delivery of the materials or supplies within the time specified, or any extension thereof, the actual damage to the Government for the delay will be impossible to determine, and in lieu thereof the contractor shall pay to the Government, as fixed, agreed, and liquidated damages for each calendar day of delay in making delivery, the amount as set forth in the specifications or accompanying papers, and the contractor and his sureties shall be liable for the amount thereof: * * * *Provided further, That the contractor shall not be charged with liquidated damages or any excess cost when the delay in delivery is due to unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God or the public enemy, acts of the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, and delays of a subcontractor due to such causes unless the contracting officer shall determine that the materials or supplies to be furnished under the subcontract are procurable in the open market, if the contractor shall notify the contracting officer in writing of the cause of any such delay, within 10 days from the beginning thereof, or within such further period as the contracting officer shall, with the approval of the head of the department or his duly authorized representative, prior to the date of final settlement of the contract, grant for the giving of such notice. The contracting officer shall then ascertain the facts and extent of the delay and extend the time for making delivery when in his judgment the findings of fact justify such an extension, and his findings of fact thereon shall be final and conclusive on the parties hereto, subject only to appeal, within 30 days, by the contractor to the head of the department concerned or his duly authorized representative, whose decision on such appeal as to the*

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facts of delay and the extension of time for making delivery shall be final and conclusive on the parties hereto * * *.

Rate of liquidated damages.—The rate of liquidated damages referred to above, shall be \$7.50 for each calendar day of delay in completing delivery. These damages may not be waived by administrative officers. [*Italics supplied.*]

The contract further provides that—

When daily copy [as was the case under Contract IS-4795] is not required, delivery of all transcripts shall be completed within a period of seven days, Sundays and holidays excluded, from the date that a hearing, conference, or other meeting is concluded, continued, or adjourned.

It appears that in the present case the hearing in question (Arkansas Coal Co., Docket #A-1639), concluded on November 17, 1942, thereby establishing November 25 as the date, after allowing the 7-day period, less one intervening Sunday, for delivery of the completed transcripts. The contractor, due to illness experienced by its selected stenographer, was unable to make delivery of the transcripts until November 27, and was accordingly assessed liquidated damages at the rate of \$7.50 per day for the 2-day period of delay after breach of the contract delivery agreement. The contractor now apparently seeks remission of the liquidated damages on the ground that difficulties arising because of unexpected illness of its selected stenographer, and its subsequent inability readily to procure substitute services, were due to unforeseeable causes beyond its control and which occurred without its fault or negligence.

An examination of Contract IS-4795 raises the question whether in the present and similar cases inability of the contractor to supply the services promised under the contract because of such difficulties is a matter so unforeseeable in nature as to constitute impossibility of performance and therefore to excuse delay or warrant extensions of time. The contractor expressly promises to "at all times provide as many competent stenographers and maintain such staff and equipment as may be necessary for the prompt furnishing of satisfactory transcripts," "in the Interior Department Building, Washington, D. C., or any other designated place within the District of Columbia, or elsewhere in the United States as may be designated * * *."

While it is well recognized that impossibility of performance due to illness of a particular person whose services are contracted for is excusable, such is not the case where a contractor promises services the performance of which is to be executed by no particular individual. Williston, *supra*, sec. 1940. It is not shown here that an unanticipated circumstance has made performance of the promise vitally different from what should reasonably have been within the contemplation of both parties when they entered into the contract, so as

to throw an unfair risk upon the contractor. One who makes a promise which cannot be performed without the consent or cooperation of a third person is not excused from liability because of inability to secure the required consent or cooperation, unless the terms or nature of the contract indicate that it does not assume this risk. *Ibid.*, sec. 1932.

It is well established that there can be no excuse unless both parties contemplate a particular means of performance and contract on the assumption of its existence. Where a promise is absolute in terms to furnish goods or services, as is the case here, the mere fact that the contractor alone contemplated a certain means of performance and had no other means will not excuse it from liability when this means becomes unavailable. See, e.g., *Pacific Sheet Metal Wks. v. Californian Canneries Co.*, 164 Fed. 980 (C. C. A. 9, 1908); *Nelligan v. Knutsen*, 38 Calif. App. 1, 175 Pac. 18, 179 Pac. 443 (1918); *Williston*, *supra*, sec. 1952. The important question is whether an unanticipated circumstance, the risk of which should not fairly be thrown upon the contractor, has made performance by it vitally different from what was reasonably to be expected. The need to obtain alternate stenographic services on short notice necessitated by illness, appears not to be such an unanticipated circumstance as to excuse the contractor. 14 Comp. Gen. 897 (1935); 15 *id.* 169 (1935). See also *Northern Pac. Ry. Co. v. American Trading Co.*, 195 U. S. 439, 25 Sup. Ct. 84 (1904); *Union Electric Co. v. Lovell Livestock Co.*, 101 Mont. 450, 54 P. (2d) 112 (1936). Since the contractor purports to be able to supply stenographers as needed in what appears to be a Nation-wide service area, it would appear to be a not unreasonable expectation, and one which no doubt was within the contemplation of both parties to the contract, in view of the human element involved, that the contractor possessed or was in a position to provide if needed, alternate stenographers in case of emergency. There is every indication that the contractor is sufficiently experienced in furnishing such services to have knowledge of the risks involved and to have provided specifically against contingencies, such as have arisen here, if it deemed it necessary in its interests to do so.

It accordingly is my opinion that since Contract IS-4795 is in form divisible, you, as contracting officer, with the approval of the head of the Department, may approve an extension of time and remit liquidated damages assessed for delay in performance, but only if such action is otherwise proper under the contract. As heretofore observed, however, I should feel constrained to recommend affirmance of any finding of fact of a contracting officer disallowing either

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remission of damages or an extension of time for performance of services under contract provisions identical with or similar to those of Contract IS-4795, should the matter be referred to this office on appeal from such a finding of fact.

PROPRIETY OF FINANCING DEMONSTRATIONAL WORK PROGRAMS WITH SOIL AND MOISTURE CONSERVATION FUNDS ALLOCATED TO THE BUREAU OF RECLAMATION

Opinion, May 31, 1943.

SECRETARY OF THE INTERIOR—BUREAU OF RECLAMATION—FEDERAL LANDS—SOIL AND MOISTURE CONSERVATION—RECLAMATION PROJECTS.

The Secretary of the Interior has power, pursuant to section 6 of Reorganization Plan No. IV (54 Stat. 1234) and the act of April 27, 1935, as amended (49 Stat. 163, 16 U. S. C. secs. 590a-590q), to perform soil and moisture conservation measures on federally owned or controlled lands under the jurisdiction of this Department and on any other lands, with the consent of the owners, where the primary purpose is the protection and benefit of federally owned or controlled lands under the jurisdiction of this Department. The fact that resultant benefits flow to privately owned lands is immaterial. The Secretary of the Interior is authorized to conduct preventive measures, including, but not limited to, engineering operations, methods of cultivation, the growing of vegetation and changes in the use of land. He may also perform measures designed to secure the preservation and improvement of soil fertility, the promotion of the economic use and conservation of land, the diminution of exploitation and wasteful and unscientific use of national soil resources, the prevention of floods and siltation of reservoirs and the improvement of irrigation and land drainage.

Specific programs outlined by the Bureau of Reclamation considered.

GARDNER, Solicitor:

My opinion has been requested as to the authority of the Bureau of Reclamation to conduct certain demonstrational work programs with soil and moisture conservation funds allocated to that Bureau. The request involves questions as to the character of lands on which soil and moisture operations may be performed and the character of operations which may be conducted with soil and moisture conservation funds, and the application of the principles thus formulated to certain specific programs.

The soil and moisture conservation powers of the Bureau of Reclamation are derived from the powers vested in the Secretary of the Interior. The Secretary's powers were acquired as a result of section 6 of Reorganization Plan No. IV (54 Stat. 1234) and have their foundation in the act of April 27, 1935, as amended (49 Stat. 163, 16 U. S. C. secs. 590a-590q). In section 1 of this act it is declared

to be the policy of Congress to provide permanently for the control and prevention of soil erosion and thereby to preserve natural resources, control floods, prevent impairment of reservoirs, maintain the navigability of rivers and harbors, protect public health, public lands and relieve unemployment. The Secretary of Agriculture is empowered to coordinate and direct all activities with relation to soil erosion and is authorized to conduct surveys, investigations, research and demonstrational projects, to carry out preventive measures, to cooperate and enter into agreements with other agencies and to acquire lands for these purposes. Section 2 authorizes the Secretary of Agriculture to perform the authorized acts on "lands owned or controlled by the United States or any of its agencies, with the cooperation of the agency having jurisdiction thereof," and "on any other lands, upon obtaining proper consent or the necessary rights or interests in such lands." And section 7 provides in pertinent part that the policy and purposes of the act shall also include (1) preservation and improvement of soil fertility, (2) promotion of the economic use and conservation of land, and (3) diminution of exploitation and wasteful and unscientific use of national soil resources.

Section 6 of Reorganization Plan No. IV provides as follows:

The functions of the Soil Conservation Service in the Department of Agriculture with respect to soil and moisture conservation operations conducted on any lands under the jurisdiction of the Department of the Interior are transferred to the Department of the Interior and shall be administered under the direction and supervision of the Secretary of the Interior through such agency or agencies in the Department of the Interior as the Secretary shall designate.

The foregoing transfer was accomplished pursuant to the Reorganization Act of 1939 (53 Stat. 561), which provides in section 8(c) that "all laws relating to any agency or function transferred to, or consolidated with, any other agency or function under the provisions of this title, shall, insofar as such laws are not inapplicable, remain in full force and effect."¹

Acting Solicitor Flanery's opinion of October 25, 1941, 57 I. D. 382, held that under section 6 of Reorganization Plan No. IV and the act of April 27, 1935, the Secretary of the Interior has power to perform soil and moisture conservation measures on federally owned or controlled lands under the jurisdiction of the Department of the Interior and on any other lands, with the consent of the owners, where the primary purpose is the protection and benefit of federally

¹ The Secretary of the Interior's soil and moisture conservation powers granted in the Taylor Grazing Act (43 U. S. C. sec. 315a *et seq.*) need not be considered in this opinion since such powers relate only to grazing lands.

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owned or controlled lands under the jurisdiction of the Department of the Interior. The fact that resultant benefits may flow to private lands was held to be immaterial.

In general, what kind of operations may be conducted with soil and moisture conservation funds on the lands so defined? The basic 1935 act provides for "preventive measures, including, but not limited to, engineering operations, methods of cultivation, the growing of vegetation, and changes in use of land * * *." This act also authorizes measures designed to secure the "preservation and improvement of soil fertility," the "promotion of the economic use and conservation of land," and the "diminution of exploitation and wasteful and unscientific use of national soil resources."

The power to perform these measures was clearly vested in the Secretary of the Interior as a result of section 6 of Reorganization Plan No. IV, subject to the limitation heretofore discussed that they be performed on, or for the primary benefit of, lands under the jurisdiction of his Department. In addition, the Secretary has been specifically granted other soil and moisture conservation powers by virtue of the language used in the soil and moisture conservation appropriation provision of the Interior Department Appropriation Act, 1943.² Under the heading "Soil and Moisture Conservation Operations" this act appropriates funds—

For all necessary expenses of administering and carrying out directly and in cooperation with other agencies a soil and moisture conservation program on lands under the jurisdiction of the Department of the Interior in accordance with the provisions of the Act entitled "An Act to provide for the protection of land resources against soil erosion," approved April 27, 1935 (16 U. S. C. 590a-590f), and Reorganization Plan No. IV, *including such special measures as may be necessary to prevent floods and siltation of reservoirs; the improvement of irrigation and land drainage; the procurement of nursery stock and the establishment and operation of erosion nurseries; the making of conservation plans and surveys; the dissemination of information; and the purchase, erection, or improvement of permanent buildings* * * *. [Italics supplied.]

For the reasons expressed in the Acting Solicitor's opinion of October 25, 1941, I believe the measures authorized by this provision, which may be said to be additional to those derived from the act and the plan, to wit, the underlined portion, may be performed on private lands where the primary benefit extends to lands under the jurisdiction of this Department. A contrary holding would so restrict the granted powers that it would be impossible in many cases to accomplish satisfactory results. It can fairly be assumed, moreover,

² Similar language appears in the appropriation bill for 1944 as it passed the House. H. R. 2719, 78th Cong., 1st sess. (act of July 12, 1943, 57 Stat. 451).

that Congress intended that these powers should be exercised in the same manner as the powers already possessed by the Secretary. There is nothing in the provision to indicate otherwise and, indeed, the statement that the newly granted powers shall be exercised "in accordance with" the act and the plan supports the assumption.

With the foregoing general principles in mind the specific programs outlined by the Bureau of Reclamation will be considered. The Bureau's conclusions as to the primary object of the programs are assumed to be proper administrative determinations for the purposes of this opinion.

I

Program I concerns proposed demonstrational measures to be conducted principally on private or entered public lands within the Gooding division of the Minnidoka project in Idaho. The Bureau proposes to demonstrate on selected areas methods of applying irrigation water and other practices bearing on the use and care of water and soil in irrigation farming. One of the principal immediate objects would be the increasing of water duty on the lands of the Gooding division now being irrigated by inducing adoption of the demonstrated practices. To the extent that water duty is increased on the presently irrigated lands through improved irrigation practices, water will become available for the irrigation of the now vacant public lands within the district which are under the jurisdiction of the Department of the Interior and this is stated to be the primary object of the demonstrations.

While the measures involved in this program are to be performed principally on private and entered public lands, the primary object of the measures will be the benefit of vacant public lands under the jurisdiction of this Department in that water will be made available for their irrigation. The measures to be performed, the demonstration of methods of applying irrigation water and other practices bearing on the use and care of water and soil in irrigation farming, are clearly authorized measures in that they are designed to secure "the improvement of irrigation" as provided in the appropriation act, and other objects authorized in the basic 1935 act, namely, the "preservation and improvement of soil fertility," the "promotion of the economic use and conservation of land," and the "diminution of exploitation and wasteful and unscientific use of national soil resources."

In view of this conclusion it is unnecessary to consider the question, which might otherwise arise in connection with this program, whether entered public lands are lands under the jurisdiction of the Department within the meaning of the 1935 act and the Reorganization

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Plan. This is also true in the case of the following programs II and III.

I am of the opinion, accordingly, that the Bureau of Reclamation is authorized to use soil and moisture conservation funds for this program.

II

Program II concerns proposed demonstrational programs to be conducted principally on private or entered public lands within the Kittitas division of the Yakima project in Washington and in the vicinity of the Deer Flat Reservoir of the Boise project. The Bureau proposes to demonstrate on selected areas methods of applying irrigation water and other practices bearing on the use and care of water and soil in irrigation farming. The demonstrations in each case would be confined to just enough lands to give practical demonstrations of the desired practices on the types of soil and topography and related qualities that are present in substantial areas in the division. In the case of the Kittitas division, Yakima project, the primary object of the program is stated to be the reduction of the siltation of canals. In the case of the reservoir on the Boise project, the object of the demonstrations is stated to be the control and reduction of the siltation of the reservoir. In each of the cases, the works (canals or the reservoir) to be benefited from the demonstrated practices are Government-owned and under the administration of this Department.

As in the case of Program I, while the work will be performed principally on private and entered public lands their primary object will be to benefit the federally owned lands comprising the canals and reservoir under the jurisdiction of the Department of the Interior. This benefit will result from the reduction of siltation of these works. Any doubt as to the propriety of considering the canals and reservoir as "lands" under the jurisdiction of the Department, the benefit of which justifies measures performed on private lands, is resolved by the provision in the appropriation act which authorizes measures to prevent "siltation of reservoirs." While canals are not specifically mentioned in this provision, the same principles and problem are involved. The canals and reservoir are interconnected. Siltation of the canals reduces their efficiency because of the resulting decrease in their carrying capacity and the velocity of the water carried. This necessarily causes a corresponding reduction in the utility of the reservoir with which they are connected.

This provision also may be said to sanction the type of operations proposed to be used in this program since these operations are designed to prevent siltation of reservoirs and canals and such preven-

tion is sanctioned. The measures involved, moreover, are similar to those in Program I and accordingly are authorized for the reasons stated, namely, they are measures designed to secure the "improvement of irrigation," as provided in the appropriation act, and the other authorized objects there specified.

It is my opinion, therefore, that the expenditure by the Bureau of Reclamation of soil and moisture conservation funds for this program is authorized.

III

Program III involves proposed demonstrational measures to be conducted principally on entered public lands in the Riverton project in Wyoming. The Bureau proposes to demonstrate in selected areas methods of applying irrigation waters and other practices bearing on the use and care of water and soil in irrigation farming. The primary object of the proposed demonstrations on the entered public lands is stated to be the prevention or reduction of the injury to vacant public lands caused by seepage and return flows in drains resulting from the excessive and improper use of water on the adjacent entered lands.

Here, also, the measures to be performed on private and entered public lands are primarily for the benefit of federally owned lands under the jurisdiction of the Department of the Interior. Similarly, the measures are of the type authorized in that they are designed to secure the "preservation and improvement of soil fertility," and the "conservation of land," provided for in the basic 1935 act, and "the improvement of land drainage," provided for in the appropriation act.

IV

Program IV concerns two somewhat different types of programs so far as immediate objectives are concerned, but with like ultimate benefits to the Government. On the Belle Fourche project in South Dakota the Bureau proposes to demonstrate on private lands and entered public lands improved irrigation practices with the immediate object of increasing the duty of water and increasing the irrigated area of lands in private ownership. On the Minnidoka project in Idaho, the Milk River project in Montana, the Uncompahgre project in Colorado, the Newlands project in Nevada and certain divisions of the Yakima project in Washington, the Bureau proposes to demonstrate principally on private lands and entered public lands improved irrigation practices, methods of drainage and other practices bearing on the use and care of water and soil in irrigation farming. The immediate objectives would be to benefit private lands

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by the establishment of a higher duty of water, the reduction of siltation of canals and drains and the prevention of the seepage of irrigable lands. The Federal Government, it is stated, would be benefited as a result of the two types of programs only because of the increased assurance that the annual repayment installments would be paid when due and that the Government's total investment in a project would ultimately be repaid.

Admittedly, the types of programs outlined under Program IV do not have as primary purposes benefits to Government-owned lands under the jurisdiction of the Department. This being the case, the prosecution of the programs with soil and moisture conservation funds would be unauthorized, for the primary object must be the benefit of such lands. The authority granted in the appropriation act provision for "the improvement of irrigation" is limited by the preceding language which requires the carrying out of the programs "on lands under the jurisdiction of the Department of the Interior in accordance with the provisions of the Act entitled 'An Act to provide for the protection of land resources against soil erosion,' approved April 27, 1935 (16 U. S. C. 590a-590f), and Reorganization Plan No. IV." This Department's power under the 1935 act and the Reorganization Plan has always been construed as limited to activities designed to benefit primarily lands under the jurisdiction of the Department. See Acting Solicitor's opinion of October 25, 1941, 57 I. D. 382.

You are advised, accordingly, that the expenditure of soil and moisture conservation funds would be authorized for Programs I, II, and III. The expenditure of such funds for Program IV would not be authorized.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

JURISDICTION OF THE SOUTH DAKOTA COURTS TO PROSECUTE INDIANS FOR VIOLATIONS OF THE STATE GAME LAWS ON ALLOTTED LANDS WITHIN THE BOUNDARIES OF THE SISSETON RESERVATION

Opinion, June 5, 1943

CRIMINAL JURISDICTION OF STATE—ALLOTTED INDIAN LANDS—UNALLOTTED INDIANS—STATE GAME LAWS—SISSETON RESERVATION, SOUTH DAKOTA—GENERAL ALLOTMENT ACT OF FEBRUARY 8, 1887—ACT OF MAY 8, 1906.

The jurisdiction of the courts of South Dakota to prosecute Indians for acts committed within the boundaries of the Sisseton Reservation depends upon

whether Congress has consented that the Indians shall be subject to the criminal laws of the State.

Congress by the act of February 8, 1887 (24 Stat. 388), subjected all allottees to the criminal laws of the States in which they resided.

By the amendatory act of May 8, 1906 (34 Stat. 182), Congress withheld such jurisdiction until the issuance of fee simple patents to Indians allotted thereafter.

Neither of these acts subjects unallotted Indians to the criminal laws of the States for acts committed within the reservations.

Indians allotted prior to the effective date of the 1906 act may be prosecuted for violations of the State game laws within the reservation.

Unallotted Indians and Indians allotted after 1906 may not be so prosecuted.

GARDNER, *Solicitor*:

I do not agree with the opinion expressed [by Commissioner of Indian Affairs] in the attached letter to the Superintendent of the Sisseton Agency relating to the jurisdiction of the State of South Dakota over the Sisseton Indians.

The Superintendent requested full information as to the jurisdiction of the South Dakota courts to prosecute Indians for violations of the State game laws when such violations occurred on allotted lands within the boundaries of the original Lake Traverse Reservation under the jurisdiction of the Sisseton Agency. The Superintendent points out that most of the allotments are no longer held by the original allottees but that they have been inherited by other Indians under his jurisdiction.

In your proposed reply you state that the Sissetons were allotted under the acts of February 8, 1887 (24 Stat. 388), and March 3, 1891 (26 Stat. 989, 1035), and that all allotments were made prior to the act of May 8, 1906 (34 Stat. 182), amending the 1887 act. You point out that under section 6 of the 1887 act the allottees were made subject to the civil and criminal laws of the State or Territory in which they reside and that the act of May 8, 1906, *supra*, modified section 6 of the earlier act by providing that "until the issuance of fee simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States" [your emphasis]. You state that the 1906 act did not cancel the criminal jurisdiction of the State extended by the 1887 act over allotments which were made prior to that act. You conclude that because all Sisseton allotments were made prior to the amendatory act of 1906, the Sisseton Indians are subject to the hunting and fishing laws of the State of South Dakota as well as to the general criminal code of the State, with the exceptions set forth in 18 U. S. C. sec. 549. You argue, in effect, that because the original allottees

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were subject to such jurisdiction those who now hold the land by inheritance or devise are likewise subject to State criminal jurisdiction by reason of the 1887 act.

I agree that the allottees who received their patents under the General Allotment Act and the act of March 3, 1891, *supra*, are probably subject to the civil and criminal laws of the State of South Dakota. However, I cannot agree that the provision in the General Allotment Act subjecting the allottees to the laws of the State had the force of subjecting unallotted Indians who have acquired the original allotments by inheritance or devise to such laws. Neither can I agree that the land comprising these allotments is within the political control of the State to the extent necessary to give the State the power to regulate the unallotted Indians' activities in connection with the wildlife thereon.

Section 6 of the act of 1887 provided:

That upon the completion of said allotments and the patenting of the lands to said allottees, each and every member of the respective bands or tribes of Indians to whom allotments have been made shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise, a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property.

The amendment of this section by the 1906 act provides:

That at the expiration of the trust period and when the lands have been conveyed to the Indians by patent in fee, as provided in section five of this Act, then each and every allottee shall have the benefit of and be subject to the laws, both civil and criminal, of the State or Territory in which they may reside; and no Territory shall pass or enforce any law denying any such Indian within its jurisdiction the equal protection of the law. And every Indian born within the territorial limits of the United States to whom allotments shall have been made and who has received a patent in fee simple under the provisions of this Act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up within said limits his residence, separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States, and is entitled to all the rights, privileges, and immunities of such citizens, whether said Indian has been or not, by birth or otherwise,

a member of any tribe of Indians within the territorial limits of the United States without in any manner impairing or otherwise affecting the right of any such Indian to tribal or other property: *Provided*, That the Secretary of the Interior may, in his discretion, and he is hereby authorized, whenever he shall be satisfied that any Indian allottee is competent and capable of managing his or her affairs at any time to cause to be issued to such allottee a patent in fee simple, and thereafter all restrictions as to sale, incumbrance, or taxation of said land shall be removed and said land shall not be liable to the satisfaction of any debt contracted prior to the issuing of such patent: *Provided further*, That until the issuance of fee-simple patents all allottees to whom trust patents shall hereafter be issued shall be subject to the exclusive jurisdiction of the United States: *And provided further*, That the provisions of this Act shall not extend to any Indians in the Indian Territory.

The legislative history of the amendatory act of 1906 shows that Congress was at that time convinced that it had been too hasty in subjecting the allottees to the criminal jurisdiction of the States and that it had not, up until the time of the decision by the United States Supreme Court in *Matter of Heff*, 197 U. S. 488 (1905), been of the opinion that, by subjecting the allottees to such criminal jurisdiction, it had legislated away from itself the right to enact laws for the protection of such allottees. In fact, Congress, in 1897, had passed a law making it a criminal offense to sell liquor to allottees whose lands were restricted against alienation or to Indian wards of the Government or to Indians over whom the Government exercised guardianship.¹ Heff was convicted by the lower court of having sold liquor to an Indian who had received an allotment under the General Allotment Act. The Supreme Court held that an Indian who had received an allotment under that act was no longer a ward of the Government. The allottee was held to be a citizen of the United States and of the State in which he resided and subject to the civil and criminal laws of that State. Such an Indian was held not to be within the reach of Indian police regulations on the part of Congress and the conviction of Heff was held to have been without the jurisdiction of the Federal court.²

It was to meet this situation that the amendatory act of 1906 was passed. The report of the Senate Committee on Indian Affairs states:

Since this decision was rendered there has been more or less demoralization among the Indians, as most of them have taken allotments and liquor has been sold to them, regardless of the fact that they are Indians, and, in the opinion of this committee, it is advisable that all Indians who may hereafter take allotments be not granted citizenship during the trust period, and that they shall be subject to the exclusive *jurisdiction* of the United States.³

¹ Act of January 30, 1897 (29 Stat. 506).

² This case was specifically overruled by the Supreme Court in *United States v. Nice*, 241 U. S. 591 (1916).

³ S. Rept. 1998, 59th Cong., 1st sess. (1906).

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The report of the House Committee on Indian Affairs is almost identical.⁴ The debate in the House indicates that the amendment under consideration was not intended to affect the status of Indians who already had received their allotments,⁵ and that the understanding of the members of Congress as to the effect of the *Heff* decision was that the State court had full jurisdiction over the allottee but not over his property.⁶

While the 1887 act provided that the United States should hold the allotted lands in trust for the use and benefit of the Indian to whom such allotment should have been made or, in case of his decease, of his heirs, and at the expiration of the trust period the United States would convey the land by patent in fee to the allottee or his heirs, there is nothing in that act which subjects such heirs to the civil or criminal jurisdiction of the States.

It has long been recognized that State laws have no force on Indian reservations in matters affecting the Indians unless Congress has sanctioned the application of such laws to the Indians and their property. In the absence of such congressional sanction, a State court has no jurisdiction to punish an Indian for acts forbidden by State law when such acts are committed within an Indian reservation. *Worcester v. State of Georgia*, 6 Pet. 515 (1832); *United States v. Kagama*, 118 U. S. 375 (1886); *In re Blackbird*, 109 Fed. 139 (1901); *In re Lincoln*, 129 Fed. 247 (1904); *United States v. Hamilton*, 233 Fed. 685 (1915); *State v. Rufus*, 205 Wisc. 317, 237 N. W. 67 (1931); see also opinions of this office 56 I. D. 38, December 11, 1936; 57 I. D. 162, September 4, 1940; 57 I. D. 295, May 28, 1941, and *Handbook of Federal Indian Law*, ch. 6 and ch. 14, sec. 7. It is fundamental that while the States may exercise jurisdiction over non-Indians and their property within Indian reservations (*Draper v. United States*, 164 U. S. 240 (1896); *United States v. McBratney*, 104 U. S. 621 (1881)), they may not interfere with the activities of the Federal Government in carrying out its policies with regard to the Indians. They may not exercise any jurisdiction over the land held in trust by the United States for the Indians which will interfere with the use thereof by the Indians. *United States v. Rickert*, 188 U. S. 432 (1903). See *Surplus Trading Company v. Cook*, 281 U. S. 647 (1930).

So long as the Indians remain on the reservations set apart for them by the United States they are within the exclusive jurisdiction of the United States and until such time as Congress decrees that the Indians

⁴ H. Rept. 1558, 59th Cong., 1st sess. (1906).

⁵ 40 Cong. Rec. 3599-3602 (1906).

⁶ 40 Cong. Rec. 3599 (1906).

shall be subject to the jurisdiction of the States, the States may not control their activities within the reservations. The State of South Dakota itself recognizes this doctrine. In a recent decision its supreme court had occasion to consider whether the enabling act admitting the State into the Union⁷ and Article XXII of its constitution, disclaiming all rights to Indian lands within the State and agreeing that such land should remain under the absolute jurisdiction and control of the United States, the court said:

* * * That these and similar provisions in other enabling acts and constitutions of the several states were inserted for the purpose of maintaining ample supreme powers on the part of the United States to permit it to fully respond to its legal and moral obligations to the Indians rather than for the purpose of withholding power from the states to exercise jurisdiction over the reservations, and that it was intended the states should exercise a limited jurisdiction over Indian reservations within their exterior boundaries, are settled propositions. [*Anderson v. Brule County*, 67 S. D. 308, 292 N. W. 429 (1940).]

To what extent has Congress sanctioned the States' exercise of criminal jurisdiction over Indians for acts committed within the boundaries of a reservation? The General Allotment Act did subject allottees to the criminal jurisdiction of the State. Congress has also by the act of February 15, 1929 (45 Stat. 1185, 25 U. S. C. sec. 231), authorized officers of any State to enforce sanitation and quarantine regulations and to enforce compulsory school attendance of Indian pupils as provided by the laws of the State on tribal or allotted lands under regulations prescribed by the Secretary of the Interior. But I am aware of no other instance in which Congress has subjected the Indians to the criminal jurisdiction of the States.

Therefore, since the unallotted Indians and Indians who received their allotments after the effective date of the 1906 act have never been subjected to the criminal jurisdiction of the States, I am of the opinion that the Department should resist the efforts of the State of South Dakota to subject these Indians to its laws when the acts complained of are committed within Indian Reservations. That Congress intended this Department, rather than the States, to take the initiative in the protection of the wildlife on such reservations is shown by the act of March 10, 1934 (48 Stat. 401, 16 U. S. C. sec. 664). This act vested in the Office of Indian Affairs and the Wildlife Service, jointly, authority to prepare plans for the better protection of the wildlife resources, including game animals, upon all Indian reservations and unallotted Indian lands coming under the supervision of the Federal Government. It authorizes the Secretary

⁷ Act of February 22, 1889 (25 Stat. 676).

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of the Interior to make the necessary regulations for the enforcement of such plans. This is an affirmative recognition by Congress that jurisdiction over Indian lands for the purpose of wildlife conservation rests in the United States rather than in the States.

ASSUMPTION OF THE DEBTS AND OBLIGATIONS OF THE MANILA RAILROAD CO. BY THE GOVERNMENT OF THE COMMONWEALTH OF THE PHILIPPINES

Opinion, June 9, 1943

MANILA RAILROAD COMPANY—RESPONSIBILITY BY THE PHILIPPINE GOVERNMENT FOR OBLIGATIONS OF THE RAILROAD—PAYMENT IN ABSENCE OF SPECIFIC OR STANDING APPROPRIATION—EFFECT OF GENERAL RULING 10-A OF THE TREASURY DEPARTMENT.

Under section 2(a)(7) of the Philippine Independence Act (48 Stat. 456, 48 U. S. C. sec. 1232(a)(7)) and section 1(7) of the Ordinance appended to the Constitution of the Philippines, the Government of the Commonwealth of the Philippines is made responsible for the obligations of the Manila Railroad Company because it was an instrumentality of the Philippine Government at the time of the adoption of the Philippine Constitution. Payment of debts on such obligations by the Philippine Government out of funds on deposit in the United States, in the absence of an appropriation therefor, is unauthorized. The Commonwealth Government is justified in refusing to make such payments in view of the prohibition of section (a)(1) of General Ruling 10-A of the Treasury Department.

GARDNER, *Solicitor*:

In a memorandum to you [Under Secretary] dated April 8, 1943, Mr. George F. Luthringer suggests that my opinion be obtained as to (1) whether the Government of the Commonwealth of the Philippines is responsible for the obligations of the Manila Railroad Company as an instrumentality of the Philippine Government within the scope of section 2(a)(7) of the Philippine Independence Act (48 Stat. 456, 48 U. S. C. sec. 1232(a)(7)) and section 1(7) of the Ordinance appended to the Constitution of the Philippines; (2) whether the appropriate officers of the Commonwealth Government may make payment of its obligations out of funds on deposit in the United States in the absence of an appropriation therefor; and (3) the effect of General Ruling 10-A of the Treasury Department with respect to the liability of the Commonwealth Government for the payment of bonds of the railroad.

1. Pursuant to the requirements of section 2(a)(7) of the Independence Act, section 1(7) of the Ordinance appended to the Constitution of the Philippines provides that, pending the final and

complete withdrawal of the sovereignty of the United States over the Philippines,

The debts, liabilities, and obligations of the present Government of the Philippine Islands, its provinces, municipalities, and instrumentalities, valid and subsisting at the time of the adoption of the Constitution, shall be assumed and paid by the Government of the Commonwealth of the Philippines.

Attached to Mr. Luthringer's memorandum are opinions of the United States Attorney General, the Judge Advocate General of the War Department, an Attorney in the State Department and a former Assistant Legal Adviser to the United States High Commissioner, all dealing with the question whether the Manila Railroad Company is an instrumentality of the Commonwealth Government within the contemplation of a substantially similar provision of the Independence Act and of the Philippine Constitution and all but the Assistant Legal Adviser to the High Commissioner answering the question affirmatively. In my opinion that conclusion is clearly correct; and I believe it to be equally plain that the Manila Railroad Company was an instrumentality of the Philippine Government at the time of the adoption of the Philippine Constitution. It follows that the obligations of the Manila Railroad Company were assumed by the Commonwealth Government under section 1(7) of the Ordinance appended to the Philippine Constitution.

By reason of its assumption of the obligations of the Manila Railroad Company, the Commonwealth Government has a direct and primary liability for the payment of the bonds of the Railroad. This direct liability is separate and apart from and in addition to the contingent liability of the Commonwealth Government under its guaranty of the interest on the First Mortgage 4% Gold Bonds of the Railroad (Act No. 1905).

2. Article VI, section 13(2) of the Philippine Constitution provides that "No money shall be paid out of the Treasury except in pursuance of an appropriation made by law." However, notwithstanding that the last appropriations made by the Philippine Legislature were for the fiscal year ended June 30, 1942, it is my understanding that interest payments on bonds of the Philippine Government continue to be made and the salaries and expenses of certain officials of the Commonwealth Government at present in Washington are also being paid from Philippine funds on deposit in the United States. Such interest payments are made under standing appropriations contained in the acts pursuant to which the bonds were issued. But the salaries and expenses of Commonwealth officials are being paid presumably on the theory that the following portion

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of section 19 of the Jones Act (39 Stat. 551, 48 U. S. C. sec. 1053) is still in full force and effect:

* * * If at the termination of any fiscal year the appropriations necessary for the support of government for the ensuing fiscal year shall not have been made, the several sums appropriated in the last appropriation bills for the objects and purposes therein specified, so far as the same may be done, shall be deemed to be reappropriated for the several objects and purposes specified in said last appropriation bill; and until the legislature shall act in such behalf the treasurer shall, when so directed by the Governor General, make the payments necessary for the purposes aforesaid.

Assuming that the above provision has not been superseded by the Independence Act and the Philippine Constitution, it will be seen that, if appropriations are not made by the Philippine Legislature for any fiscal year, the expenditure of public funds during that year is authorized only in the amounts and for the objects and purposes specified in the last appropriation bills enacted by the Legislature. I am not aware that funds for the payment of interest on bonds of the Manila Railroad Company were appropriated by the Commonwealth Legislature for the fiscal year 1942. Accordingly, in the absence of a standing appropriation therefor, the payment of interest on such bonds by officials of the Commonwealth Government out of funds other than those of the Company would appear to be improper.

Act No. 1730, dated September 30, 1907, makes a continuing annual appropriation to meet the obligations of the Philippine Government accruing under its guaranty of interest on the 4% bonds of the Railroad. However, no such standing appropriation for the purpose of meeting the obligations assumed by the Commonwealth Government has come to my attention. I conclude, therefore, that the expenditure of public funds by Commonwealth officials for the payment of interest on, or for the purchase or retirement of, the 5% bonds of the Railroad, which have not been guaranteed but for which the Commonwealth Government is obligated only by reason of its assumption of the obligations of the instrumentalities of the former Government, would not be authorized. Similarly, the payment of interest on the 4% bonds of the Railroad, if sought to be made pursuant to the assumption of such obligations by the Commonwealth rather than by reason of its guaranty, would also be unauthorized for lack of an appropriation.

3. General Ruling 10-A of the Treasury Department provides, in part, as follows:

(a) Unless authorized by a license expressly referring to this general ruling:

(1) No Philippine company shall make any payment, or perform any covenant, duty, condition or service within the United States on, or with respect to, any direct or indirect obligation or security of, or claim against, such company.

(2) No person shall exercise within the United States any right, remedy, power or privilege with respect to, or directly or indirectly arising out of or in connection with, any obligation or security of, or claim against, any Philippine company, including any right, remedy, power or privilege with respect to any guaranty, covenant or agreement that such Philippine company will perform any covenant, duty, condition, or service.

In view of the prohibition in paragraph (1) of section (a) of General Ruling 10-A against payments by a Philippine company unless authorized by license, the Commonwealth Government has taken the position that there has been no default by the Railroad with respect to the payment of interest on its 4% bonds and that, therefore, the contingent liability of the Commonwealth Government for such interest under its guaranty has not ripened into a present obligation. I believe that, if a license has not been issued authorizing such interest payments by the Railroad, the Commonwealth Government is legally within its rights in refusing to make such payments under its guaranty and, under paragraph (2) of section (a) of the Ruling, could resist any effort by bondholders to enforce its guaranty. While this Ruling would not, in my opinion, justify a refusal by the Commonwealth Government to pay interest on such bonds pursuant to its direct liability under its assumption of such obligations, such payments by Commonwealth officials, as I have indicated above, would be unauthorized for lack of an appropriation. Whether in the present circumstances the Commonwealth Government should waive the benefit and advantage of General Ruling 10-A and apply for a license for the purpose of making interest payments on the 4% bonds under its guaranty is, of course, beyond the scope of this memorandum.

RESTRICTION AGAINST ALIENATION OF ALLOTTED INDIAN LAND

Opinion, June 17, 1943

OSAGE INDIANS—INDIAN LANDS—RESTRICTION AGAINST ALIENATION—ACT OF APRIL 18, 1912—ACT OF FEBRUARY 27, 1925—ACT OF MARCH 2, 1929—REIMPOSITION OF RESTRICTION AGAINST ALIENATION.

An unallotted Osage Indian who inherited an undivided interest in an Osage allotment in 1921 took her interest free from restriction against alienation under section 6 of the act of April 18, 1912 (37 Stat. 86).

Restrictions against alienation, applicable to members of the Osage Tribe, were extended to unallotted Osage Indians by the act of March 2, 1929 (45 Stat. 1478).

Among those restrictions was that imposed by the act of February 27, 1925 (43 Stat. 1008), that lands devised to or inherited by members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of

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competency shall be inalienable except with the approval of the Secretary of the Interior.

An unallotted Osage Indian who has not received a certificate of competency may not, after March 2, 1929, alienate his interest without the approval of the Secretary of the Interior.

Any conveyance or encumbrance of the interest between 1921 and 1929 is as valid as a similar conveyance or encumbrance executed by any person not under any legal disability.

GARDNER, *Solicitor*:

The Commissioner of Indian Affairs has presented for consideration the question of whether a one-third undivided interest in certain allotted Osage Indian lands is restricted in the hands of its present owner, Joella Gentry, now Tiger, an unallotted Osage Indian of less than one-half degree Indian blood who has never received a certificate of competency.

On August 25, 1942, you approved an opinion of this office, 58 I. D. 117, *supra*, that the undivided interests of two unallotted Osage Indians in certain lands in the State of New Mexico were unrestricted. The Commissioner desires to be informed whether, by reason of that opinion, the lands here in question must be considered unrestricted.

The lands discussed in the opinion of August 25, 1942, had never been restricted against alienation. They had been purchased with the unrestricted funds of the persons from whom the unallotted Osage Indians took by devise. This office held that while section 3 of the act of February 27, 1925 (43 Stat. 1008), which was made applicable to unallotted Osage Indians by section 5 of the act of March 2, 1929 (45 Stat. 1478), reimposed restrictions against alienation of lands devised to or inherited by Osages of one-half or more degree Indian blood or those not having certificates of competency, those acts did not apply because the lands there in question were at no time restricted in the hands of the devisors. That opinion has no bearing on the question now presented except insofar as it was pointed out therein that restrictions against alienation of lands theretofore restricted were reimposed on unallotted Indians by section 5 of the act of March 2, 1929, *supra*.

The question here presented is fully answered by an opinion of this office approved by you on January 26, 1937 (M. 27963) (unreported). There the question was whether the interest in an Osage allotment inherited by John Holloway, an unallotted Osage of less than one-half degree Indian blood without a certificate of competency, descended to him subject to restrictions against alienation. His interest came to him by inheritance from his wife, Alice King, also an unal-

lotted Osage without a certificate of competency, who inherited the land in 1925. John Holloway inherited his interest in 1932. After discussing fully the various acts of Congress dealing with the Osage Indians and the decisions of the courts construing such acts, the conclusion was reached that Alice King who had inherited her interest in the lands prior to 1929, took such interest free of all restrictions against alienation. This conclusion was based on the fact that prior to that time unallotted Indians were not considered members of the Osage Tribe and, not being members, all restrictions against alienation of their inherited interests in Osage lands were removed by section 6 of the act of April 18, 1912 (37 Stat. 86). *United States v. La Motte*, 67 F. (2d) 788 (C. C. A. 10, 1933).

The 1929 act was construed as reimposing restrictions on these lands in the hands of Alice King. John Holloway was held to have taken his interest subject to restrictions against alienation. An attempted conveyance of his interest by John Holloway without the approval of the Secretary of the Interior was held to be void. Thereafter the attempted conveyance was the subject of a suit in the United States District Court for the Northern District of Oklahoma in the case of *United States v. Johnson*, 29 F. Supp. 300 (1939). The court reached the same conclusion as my predecessor, namely, that John Holloway's interest was restricted.

In the present case, Joella Gentry took her interest in these lands upon the death of her mother, Blanch Fronkier, on September 8, 1921. Blanch Fronkier was an Osage allottee of less than one-half degree Indian blood who had received a certificate of competency during her lifetime. At the time of her death all of her Osage lands were unrestricted both by reason of the issuance to her of the certificate of competency and section 3 of the act of March 3, 1921 (41 Stat. 1249), which removed all restrictions against the alienation of the allotment selections, both surplus and homestead, of all adult Osage Indians of less than one-half degree Indian blood.

Joella Gentry took these lands free from restrictions under section 6 of the act of April 18, 1912, *supra*, and held them unrestricted from the date of her mother's death until March 2, 1929, when the restrictions against alienation applicable to the members of the Osage Tribe were extended to unallotted Osage Indians and their heirs of Indian blood. *United States v. Howard*, 8 F. Supp. 617 (Okla. 1934); *United States v. Johnson*, *supra*. Among the restrictions made applicable was the provision contained in section 3 of the 1925 act, *supra*, that lands devised to members of the Osage Tribe of one-half or more degree Indian blood or who do not have certificates of competency, under wills approved by the Secretary of the Interior, and

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lands inherited by such Indians shall be inalienable unless such lands be conveyed with the approval of the Secretary of the Interior. Joella Gentry does not have a certificate of competency and since she inherited these lands they must be considered restricted from and after March 2, 1929.

The Commissioner of Indian Affairs states that Joella Gentry has executed two mortgages on her inherited interest in the lands in question. He states that if the conclusion be reached that her interest in these lands is restricted it is his intention to request that the matter be submitted to the Department of Justice with the request that suit be instituted to clear her title. The Commissioner fails to state the dates on which the mortgages were executed. It must be remembered that Joella Gentry's interest in these lands was entirely unrestricted from September 8, 1921, until March 2, 1929. During that period any conveyance or encumbrance of the land made by Joella Gentry would be as valid as a similar conveyance or encumbrance executed by any person not under any legal disability.

In my opinion the mortgages should be examined to ascertain the dates upon which they were executed. Unless they were executed after March 2, 1929, the Department of Justice should not be requested to institute suits to cancel them.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

APPLICABILITY TO THE NATCHEZ TRACE PARKWAY OF FEDERAL CRIMINAL STATUTES AND NATIONAL PARK SERVICE REGULATIONS RELATING TO THE PROTECTION AND REGULATION OF USE OF FEDERAL PROPERTY

Opinion, June 18, 1943

SECRETARY OF THE INTERIOR—NATIONAL PARK SERVICE—FEDERAL LANDS—REGULATIONS—PARKWAYS—CONSTITUTIONAL LAW—PROTECTION AND REGULATION OF USE OF FEDERAL PROPERTY.

Pursuant to Article IV, sec. 3, cl. 2 of the Federal Constitution the Congress may legislate for the protection and regulation of use of all Federal lands. With respect to parks and parkways, Congress has also authorized the Secretary of the Interior to issue regulations designed to effectuate this power. The Federal criminal laws and National Park Service regulations relating to the protection and regulation of use of Federal property are applicable to the Natchez Trace Parkway lands, the title to which is vested in the United States.

GARDNER, *Solicitor*:

My opinion has been requested as to whether Federal criminal statutes and National Park Service Regulations relating to the protection and regulation of the use of Federal property are applicable to the Natchez Trace Parkway and, if not, the procedure which should be adopted to remedy the situation and protect this Federal property.

Title to the majority of the lands comprising the parkway, lying in the States of Alabama, Tennessee and Mississippi, has been acquired and is vested in the United States pursuant to the act of May 18, 1938 (52 Stat. 407, 16 U. S. C. sec. 460). Neither the State of Alabama nor the State of Tennessee has ceded jurisdiction, exclusive or partial, over the parkway lands in those States. The State of Mississippi has adopted an act ceding to the United States concurrent jurisdiction over the national parkways within that State, subject to the condition that such concurrent jurisdiction shall not vest in the United States unless and until it, through the proper officer or officers, notifies the Governor that the concurrent jurisdiction is accepted. Section 1896, Mississippi Code, 1938 Supplement. No action has been taken to accept the concurrent jurisdiction ceded by Mississippi. In the circumstances, the political jurisdiction of the State of Mississippi over the park lands continues.

In my opinion Federal criminal statutes and National Park Service Regulations relating to the protection and regulation of the use of Federal property are applicable to those Natchez Trace Parkway lands title to which is vested in the United States, despite the fact that there has been no cession of police jurisdiction to the Federal Government.

Article IV, sec. 3, cl. 2 of the Constitution provides: "The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States * * *." Pursuant to this constitutional authority, Congress has legislated generally to make the commission of any willful injury to, or depredation against, any property of the United States a Federal offense (18 U. S. C. sec. 82), and has legislated more specifically with respect to various types of depredation, such as timber depredation (18 U. S. C. 103), setting fires (18 U. S. C. 106), trespass by livestock (18 U. S. C. 110), and the injuring of telegraph lines (18 U. S. C. 116). In these and many other respects Congress has provided that the Federal Government may in protecting its own property secure in its own courts redress against offenses which if committed against private landowners could ordinarily be punished only in the State courts. The validity of such legislation

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is considered and upheld in *Camfield v. United States*, 167 U. S. 518,¹ in which there was called into question the validity of an act of Congress which made it a Federal crime to construct fences on private property in such a manner as to enclose areas of public land. The Court observed that to deny Congress the power thus to protect the public property which the Constitution entrusts to its management "would place the public domain of the United States completely at the mercy of State legislation." [At p. 526]

Apart from the foregoing instances in which Congress has legislated directly, there are various acts of Congress which confer upon executive officers the power to issue regulations for the protection of public property and which make the violation of such regulations a Federal offense. The validity of such laws and regulations is confirmed by the Supreme Court in *United States v. Grimaud*, 220 U. S. 506,² where the offense charged was stock trespass within a national forest in violation of regulations issued by the Department of Agriculture. Here, again, the decision of the courts was predicated upon the power of Congress to protect Federal property, and not upon any relinquishment or cession of ordinary police jurisdiction from the State in which the property was situated.

Similarly Congress has conferred upon the Secretary of the Interior broad powers to manage and protect park property, has authorized the issuance of regulations directed to those ends and has made the violation of such regulations a Federal offense. The chief statute setting forth the scope and force of "national park regulations" is the original National Park Service Act of August 25, 1916, of which section 3, as embodied in the United States Code (title 16, sec. 3), declares:

The Secretary of the Interior shall make and publish such rules and regulations as he may deem necessary or proper for the use and management of the parks, monuments, and reservations under the jurisdiction of the National Park Service, and any violation of any of the rules and regulations authorized by this section and sections 1, 2, 4, 22 and 43 of this title shall be punished by a fine of not more than \$500 or imprisonment for not exceeding six months or both, and be adjudged to pay all costs of the proceedings.

At the time of the enactment of this legislation 10 of the national parks now in existence had already been established, and seven of these were subject to State police jurisdiction.³ Only three parks

¹ Accord: *McKelvey v. United States*, 260 U. S. 353.

² Accord: *Light v. United States*, 220 U. S. 523; *Utah Power & Light Co. v. United States*, 243 U. S. 389.

³ General Grant, Lassen Volcanic, Platte, Rocky Mountain, Sequoia, Wind Cave, and Yosemite Parks. In addition, a large number of national monuments were covered by the National Park Service Act, and practically all of these were under State police jurisdiction.

were under the exclusive jurisdiction of the United States.⁴ The National Park Service Act was clearly intended to apply to all of the national parks, and not merely to the three parks over which State jurisdiction had been relinquished. Congress in this statute attempted to do what the Supreme Court in the *Camfield* case said it had a right to do under the Constitution, namely, to make the misuse of public property a Federal offense. It attempted to do this in the manner upheld by the Supreme Court in the *Grimaud* case, namely, by authorizing the issuance of departmental regulations defining acts which would be punishable in the Federal courts.

The Department in issuing regulations pursuant to the National Park Service Act of 1916 has not distinguished between those parks in which exclusive jurisdiction has been ceded to the Federal Government by the States and those parks in which the only authority of the Federal Government is the authority derived from Article IV, section 3, of the Constitution. The basis of the departmental regulations in this field is the authority which is common to all the parks, namely, the constitutional authority to make needful rules and regulations respecting the property of the United States.

This has been the view of the courts and of the Attorney General whenever the question has arisen.

In *Robbins v. United States*, 284 Fed. 39 (C. C. A. 8, 1922), the court upheld the validity of a departmental regulation prohibiting certain forms of commercial traffic in Rocky Mountain National Park, an area in which exclusive jurisdiction was not ceded by the State of Colorado until 1929, seven years subsequent to the decision in the case. While some reference was made in the opinion to the claim that certain portions of State sovereignty had been ceded to the Federal Government, the chief basis of the opinion was set forth in the following terms:

But we are of the opinion that the power of the government to regulate the traffic on those highways, as it has done by congressional enactment and rules thereby authorized, rests on the secure footing that it is a valid exercise of control over the property of the government, even though it is of the nature of police power, and that it is sustained by section 3, art. 4, of the federal Constitution, which entitles the government to make all needful regulations respecting its territory and property.

Neither grants of rights of way on the public lands, accepted by user or statute, nor state ownership of highways derived from the government or otherwise effect any abdication of such constitutional authority. Both the power of Congress to grant easements in favor of the public for travel and transportation and its power to legislate concerning territory and property are and must be consistently exercised, and the latter is accomplished by regula-

⁴Crater Lake (jurisdiction ceded August 21, 1916), Glacier, and Yellowstone parks.

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tions to the end of devoting the adjacent domain owned by the government to the lawful purposes and objects for which a national park is granted. We therefore hold that the regulations here involved cannot be successfully assailed because of interference with private right to use the highways in the Rocky Mountain National Park. [P. 45]

A related question was considered by the Attorney General (35 Op. Atty. Gen. 305) in connection with a regulation forbidding all persons to engage in business in the national parks without the permission of the Director or Superintendent of the park. Under that regulation the use of a "Drivurself System" in the national parks was prohibited. In upholding the validity of this action, the Attorney General, after analyzing the cases interpreting Article IV, section 3 of the Constitution, and referring to the National Park Service Act of August 25, 1916, as an exercise of the constitutional power vested in Congress by that Article, declared:

There does not appear to be room for doubt that under the terms of the Act the Director of the National Park Service, under the direction of the Secretary of the Interior, is given the supervision, management, and control of the national parks and monuments, and that the Secretary of the Interior is given broad authority to make and publish such rules and regulations as may be necessary or proper for the guidance of the director in his administration of the Park Service as directed by Congress. See *Robbins v. United States*, 284 Fed. 39. [P. 307]

The distinction between proprietary control and general jurisdiction is further clarified in a subsequent opinion of the Attorney General relating to Grand Canyon National Park (36 Op. Atty. Gen. 527, 530):

The United States does not have exclusive jurisdiction over the park area. The United States is a proprietor of that part of the park area forming part of the public domain and not privately owned by others, and it also has certain sovereign powers under the Constitution to take such action and establish such regulations as are reasonably necessary to protect the property and control and regulate its use for National park purposes. The State, however, exercises jurisdiction throughout the park area just as it does throughout the rest of the State, subject to the limitation that the State may not embarrass, impair, or defeat the effective use of the lands for the purposes for which they are held, or interfere with the power of the United States to control and protect or dispose of them. *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 527; *Chicago and Pacific Railway Co. v. McGlinn*, 114 U. S. 542, 545; *Surplus Trading Co. v. Cook*, 281 U. S. 647, 650; *United States v. Unzeuta*, 281 U. S. 138, 142. See *Hunt v. United States*, 278 U. S. 96; *Utah Power and Light Co. v. United States*, 243 U. S. 389, 404, 405; *Ohio v. Thomas*, 173 U. S. 276, 283.

The proprietary control which the Federal Government may exercise over park lands where primary jurisdiction remains in the State is, of course, limited to powers which are reasonably related to the

protection and use of the property. As such, it is generally cognate with the control which any private landowner may exercise over the use of his own land, the chief difference being simply that the United States is constitutionally authorized to enforce its control in the Federal courts, whereas a private landowner is generally limited to the State courts. But as in the case of the private landowner, the Federal Government may not, in the guise of protecting and managing its own property, enforce regulations not reasonably related to those purposes and thereby infringe on State jurisdiction.⁵ Thus in *Colorado v. Toll*, 268 U. S. 228, the Supreme Court held that the Federal Government's proprietary control over its own lands in the Rocky Mountain National Park did not enable it to prohibit commercial traffic on a State highway running through the park. And in *Curtin v. Benson*, 222 U. S. 78, the Supreme Court held that where a private landowner within the Yosemite Park boundaries violated park regulations on stock trespass this did not give the park superintendent the right to remove such stock from such private lands or to exclude them from transit across a private toll road. Nothing in this opinion, however, limits the Federal authority to establish, and to enforce by other means, reasonable regulations to prevent stock trespass on park lands, and in fact the Court suggests that a law or regulation might require private landowners to fence their lands and might make trespass of livestock on park lands a Federal offense.

These cases, therefore, do not detract from the general principle that the proprietary control of the Federal Government over its own lands includes authority to issue and enforce regulations covering the use and management of such lands.

It is not necessary that I undertake at this time to examine into the validity of each separate Park Service regulation under the foregoing authorities. Such an examination was presumably made when the present regulations were first issued. The record submitted in this case indicates that what is now in question is the appropriateness of proceeding in the Federal courts to enforce regulations prohibiting stock trespass on federally owned park lands. Prohibitions against trespass fall clearly within the power of a private landowner, and the validity of such prohibitions on the part of the Federal Government has been specifically upheld by the Supreme Court. *United States v. Grimaud*, 220 U. S. 506; *Light v. United States*, 220 U. S. 523. With respect to these regulations and all other such protective measures, I believe that the authority of the United States cannot be effectively challenged.

⁵ See Pillsbury, "Law Applicable in National Parks" (1934), 22 Calif. L. Rev. 152.

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The special legislation affecting the Natchez Trace Parkway, in extending to these lands the provisions of the National Park Service Act of 1916 which authorize regulations, confirms the application of the foregoing principles. In the act of May 21, 1934 (48 Stat. 791), Congress appropriated funds for a survey of the Old Natchez Trace and an estimate of cost and other information relating to the construction of the Natchez Trace Parkway. By the act of May 18, 1938 (52 Stat. 407, 16 U. S. C. sec. 460), Congress established the parkway in the States of Mississippi, Alabama and Tennessee and vested the functions of administration and maintenance of it in the Secretary of the Interior, through the National Park Service, subject to the provisions of the National Park Service Act of August 25, 1916 (39 Stat. 535, 16 U. S. C. secs. 1-4).

There remains to be considered the act of February 1, 1940 (54 Stat. 19), amending section 355, Revised Statutes (40 U. S. C. 255). This act provides in part as follows:

Notwithstanding any other provision of law, the obtaining of exclusive jurisdiction in the United States over lands or interests therein which have been or shall hereafter be acquired by it shall not be required; but the head or other authorized officer of any department or independent establishment or agency of the Government may, in such cases and at such times as he may deem desirable, accept or secure from the State in which any lands or interests therein under his immediate jurisdiction, custody, or control are situated, consent to or cession of such jurisdiction, exclusive or partial, not theretofore obtained, over any such lands or interests as he may deem desirable and indicate acceptance of such jurisdiction on behalf of the United States by filing a notice of such acceptance with the Governor of such State or in such other manner as may be prescribed by the laws of the State where such lands are situated. *Unless and until the United States has accepted jurisdiction over lands hereafter to be acquired as aforesaid, it shall be conclusively presumed that no such jurisdiction has been accepted.* [Italics supplied.]

It might be argued that by the foregoing provision⁶ Congress has renounced the right of the United States to protect and regulate the use of its property within a State except in those cases where jurisdiction has been accepted in accordance with the terms of the act.

I do not believe, however, that the provision affects the right of the Federal Government to protect and regulate the use of its property within a State. The provision concerns "cession of * * * jurisdiction." No other powers or rights over lands are specified or intended to be covered. In this context, the term "jurisdiction" clearly means the political or legislative power normally vested in the several States. Certainly that is the only power the States could cede. The

⁶ This provision was repeated without change in the act of October 9, 1940 (54 Stat. 1083, 1084), which is also amendatory of section 355, Revised Statutes.

right of the United States to protect, and regulate the use of, its property within a State is not "jurisdiction" in this sense, but a proprietary right which exists solely as a result of ownership and the power over its property which the States have surrendered to the Federal Government by Article IV, sec. 3, cl. 2, of the Constitution. The distinction between this sovereign "jurisdiction" and the proprietary rights of the United States is clearly established by the decisions of the Supreme Court relating to this subject. That Court has held that as to lands acquired by the United States within a State which are not purchased with the consent of the State for the erection of forts, magazines, arsenals, dockyards, and other needful buildings or which are not the subject of a cession of jurisdiction by the State, the State retains "complete and perfect jurisdiction." See *Fort Leavenworth R. R. Co. v. Lowe*, 114 U. S. 525, 538. Yet in the *Fort Leavenworth* case, and other cases heretofore cited, the Court has held that the United States acquires the right to protect and regulate the use of such lands. It is also significant that the Court uses the term "jurisdiction" only when referring to the sovereign political or legislative power normally reserved to the States. In none of the cases does the Court at any place refer to the proprietary rights of the United States as "jurisdiction." Apparently, therefore, the proprietary rights of the United States do not constitute "jurisdiction" within the meaning of the 1940 statute.

I believe, therefore, that the Federal Government is vested with power to protect and regulate the use of Natchez Trace Parkway lands title to which is vested in the United States, and accordingly that Federal criminal laws and National Park Service regulations relating to the protection and regulation of the use of Federal property are applicable to these lands.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

CLARENCE H. STEUSSY

Decided June 22, 1943

MINING CLAIM—ABANDONMENT.

A claimant of land cannot be heard to say he has a right to make homestead entry thereof and at the same time assert that he has a right thereto by virtue of a prior placer mining location, but if he files a proper application to make homestead entry it has the legal effect of an abandonment of all estate, right or interest he may have in the prior mining location.

Len S. English v. William P. Birchfield et al., 56 I. D. 22;

Henry W. Pollock, 48 L. D. 5, cited and applied.

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CONTEST—BURDEN OF PROOF.

Land not returned as mineral is *prima facie* subject to be entered under the laws applicable to entry of agricultural land, and the burden is on a mineral claimant to contest the homestead application and show the contrary.

Caledonia Mining Company v. Rowen, 2 L. D. 714;

Dughi v. Harkins, 2 L. D. 721;

Magalia Gold Mining Company v. Ferguson, 3 L. D. 234, cited and applied.

APPLICATION—HOMESTEAD.

Where proceedings were brought charging the invalidity of a placer mining claim located on account of borate mineral and one of the locators who had settled upon and improved the land prior to the withdrawal of November 26, 1934, filed an application to make homestead entry thereof alleging the land was nonmineral, and upon dismissal of the proceedings, the applicant and his co-locators expressed the view that no discovery had been made and their willingness to relinquish the mining claim; *Held*, that in order that the mining claim may be deemed entirely extinguished, in the absence of an adjudication in a proper proceeding that it is void, all present record claimants of the mining title must either join in a relinquishment of the claim to the United States or convey their individual interest therein to the homestead applicant, who thereupon may file such a relinquishment and thereby remove all question as to the propriety of allowing the homestead entry by reason of the existence of any mineral not subject to reservation.

APPLICATION—HOMESTEAD.

No good reason is seen for questioning the validity of a homestead application on the ground that the applicant joined with others in endeavoring to establish that the land was mineral in character, and to initiate a valid right of possession under the mining law, and, failing in that, to seek rights and a title under a law under which appropriate disposition thereof may be made.

WITHDRAWAL—VALID RIGHT.

A homestead application filed May 8, 1934, upon land not returned as mineral land though embraced in a placer mining location, may be considered as valid and as effectively segregating the land as of the date of filing and as not affected by the withdrawal of November 26, 1934, upon relinquishment of the mining claim by the locators.

CHAPMAN, *Assistant Secretary*:

May 8, 1934, Clarence H. Steussy filed application, Los Angeles 051959, under Rev. Stat. sec. 2289, to make homestead entry of the NE $\frac{1}{4}$ Sec. 30, T. 11 N., R. 7 W., S. B. M. The application contained the usual allegation that the land was not known by applicant to contain a valuable mineral deposit, but to the statement that—

* * * no portion of said land is claimed for mining purposes under the local customs or rules of miners, or otherwise,

the applicant added the words—

* * * except a placer location by myself and 7 others, title to which has not been established. The case is now pending before the Department and this application is made to protect my holdings in case land is declared non-mineral in character.

With the application, consent was filed to a reservation of minerals under the act of July 17, 1914 (38 Stat. 509, 30 U. S. C. sec. 123), and a waiver to claim compensation under section 29, act of February 25, 1920 (41 Stat. 437, 30 U. S. C. sec. 186).

The case pending to which the applicant referred in his homestead application was evidently that entitled *Clarence H. Steussy et al. v. Burnham Chemical Company, United States, Intervenor*, in which the plaintiffs protested against the application, Los Angeles 045696, for a sodium prospecting permit filed by the defendant which covered, among other lands, that above described. The plaintiffs alleged the validity of the Good Hope No. 1 placer mining claim located June 14, 1926, covering the said NE $\frac{1}{4}$ Sec. 30, T. 11 N., R. 7 W., based upon the disclosure of borate minerals and compliance with other requirements of the mining law. It is sufficient here to state that the permit application of defendant was rejected by the Commissioner of the General Land Office September 21, 1939, without determination of the validity of the alleged placer claim of the plaintiff, and the case closed January 8, 1940.

In connection with the homestead application, the applicant filed on August 2, 1935, a request for its suspension, alleging that he was then engaged in drilling test holes to bed rock to determine whether the land was mineral or nonmineral in character. By reason of the conflict between the homestead and the permit application, the Commissioner called upon the Geological Survey under the provisions of the act of March 4, 1933 (47 Stat. 1570, 30 U. S. C. sec. 124, Circ. 1303, 43 CFR 102.22), and regulations thereunder, for a report as to whether the disposal of the land under the nonmineral application will interfere with operations under the mineral leasing acts, and the Geological Survey replied in the negative.

The land, however, had not either been withdrawn, classified or reported as valuable for any of the minerals named in the leasing acts, and the question of interference was not material.

By decision of February 11, 1943, the Commissioner held:

Occupancy of land under a mining location is incompatible with an application by the mining locator to enter the land under the homestead law. The fact that he states that he merely filed the latter application in order "to protect my holdings in the event the land is declared nonmineral in character" does not permit him to have the two filings of record at the same time. Under his mining location he could occupy the land for the purpose of determining definitely whether what appeared to him when he filed his location to be

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mineral land is in fact mineral in paying quantities and sufficient to warrant further effort. Therefore, the application which should have been rejected when filed, is hereby held for rejection, which action will become final 30 days from service of notice hereof. Applicant has a right of appeal.

The response by the applicant was treated as an appeal, and so far as material is as follows:

In your letter you state that you are holding for rejection the above numbered Homestead Application due to its conflict with a Valid Mineral Claim upon said land. Now in consideration of the facts as hereinafter enumerated said Clarence H. Steussy wishes you to reconsider this action and Grant his said application for Homestead and no longer hold it in suspension. If you can do so he and his Co-Locators will relinquish all their rights to the Minerals Leaseable under the Sodium Leasing Act which they had as well as any other claim they have under the Mining Laws of the United States, upon this above described land. However, if after releasing these rights you could not, or would not grant said Clarence H. Steussy, his Homestead Rights in full to this land, he and his Co-Locators would not feel that it was fair to discard their rights needlessly.

We feel that if you would assure him that you could grant this Homestead Application as though there were never any mineral conflict, then we would gladly reserve to the United States all Minerals upon this Land, and relinquish any and all Mineral Claims thereon. The facts regarding this matter are:

In 1927 Clarence H. Steussy did construct a livable house upon said land, which later burned down. He did thereupon build an entirely new house upon the same location. He has at present six buildings with a total value in excess of \$5,000 upon this land all erected at his own expense as well as roads graded upon same at his own expense. He has constructed a large water storage tank and erected same to a height of 40 feet, installed pipes to these buildings and planted trees and shrubs around them.

He has not at any time since February 1928 left this land for more than two weeks at any time and has since early 1927 had his family residing upon this land continuously. Therefore this has been and is his only home to the present date.

In addition to these facts he has at all time paid all Taxes levied upon this land as Possessory Interest, Improvements and Personal Property without any contributions from any of his Co-Locators towards them. He has also performed prospecting work and assessment in the Valid holding of the above Mineral Claim at the instance of his Co-Locators and himself. These Locators have not at any time been able to actually discover minerals in Commercial Quantities which would entitle them to a patent for the land under the Mineral Laws.

In 1934 said Clarence H. Steussy did file an Application for Homestead to be held in abeyance in order to protect his own personal holdings in event of the actual determination of the apparent nonmineral character of the land and not in any way to conflict with the Law. This he did because he had in fact made this land his home and was entitled to as much protection upon his home as it was possible to obtain.

Due to the fact that we have exercised due diligence in our prospecting and have not been successful in our endeavors and that we are of the opinion now that this land should be classified as nonmineral we are willing to relin-

quish to said Clarence H. Steussy all our Mineral Rights so that he, in turn, may relinquish them to the United States in exchange for the granting of his Homestead Application.

Very truly yours,

(Sgd) Clarence H. Steussy

Clarence H. Steussy, Attorney in Fact for: H. E. Friedrichs, Carl D. Hegner, Ola E. Steussy, Clarence H. Steussy, Charles R. Harrel, C. L. Harrel, R. N. Hegner, Wm. F. Hegner.

It is true that a claimant of land cannot be heard to say he has a right to make homestead entry thereof and at the same time assert that he has a right thereto by virtue of a prior placer mining location, but if he files a proper application to make homestead entry it has the legal effect of an abandonment of all estate, right or interest he may have in the prior mining location. *Len S. English v. William P. Birchfield et al.*, 56 I. D. 22, 30; *Henry W. Pollock*, 48 L. D. 5, 10.

In his application, Steussy did not assert that the placer claim was valid, nor that work was being prosecuted in search of mineral. To the contrary, he asserted that the land was essentially nonmineral, and indicated that the question of the validity of the claim was pending in proceedings in the Department and that the application was filed to protect his holdings in event the land was declared nonmineral. It is elementary under the mining law that there is no valid appropriation of land by location without discovery. *United States v. Hurliman*, 51 L. D. 258; *Magruder v. Oregon and California R. R. Co.*, 28 L. D. 174, 30 U. S. C. A. sec. 23, Note 131. The interpolation, quoted above, in the standard form of the homestead affidavit, though making the application somewhat ambiguous, did not prima facie show that the application was not allowable for the reason that the land was mineral land or in the actual possession of the claimants diligently engaged in the search for mineral. The appropriate action would have been to call for further showing and await the outcome of the proceeding involving the validity of the claim asserted by Steussy and his associates. As we have seen, however, the validity of the claim was not determined and the proceedings dismissed. The records of the General Land Office show that the land in question was not returned as mineral land by the surveyor general but had it been so returned, the filing of the nonmineral affidavit is deemed sufficient as a preliminary requirement (43 CFR 185.92). The land not having been returned as mineral in character, prima facie it was subject to be entered under the laws applicable to entry of agricultural land, and the burden would be upon a mineral claimant to contest the application and show the contrary. *Caledonia Mining Company v. Rowen*, 2 L. D. 714, 717; *Dughi v.*

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Harkins, 2 L. D. 721; *Magalia Gold Mining Company v. Ferguson*, 3 L. D. 234. However, the fact that the records of the Land Department show that the land is free from claim of any kind is not conclusive that the land has not been validly appropriated under the mining laws. *Roos v. Altman et al.*, 54 I. D. 47, 53. Steussy now admits in his appeal that after diligent search the locators of the mining claim on the land in question have not been able actually to discover mineral in commercial quantities and states that the locators are willing to relinquish all their rights to him and he in turn will relinquish all rights in the claim to the United States. However, his acts and declarations, in the absence of evidence of a full power of attorney from his co-locators, cannot be accepted as binding on them, and would not preclude them from asserting rights under the mining location. In order that the mining claim may be deemed entirely extinguished, in the absence of an adjudication in a proper proceeding that it is void, all present record claimants of the mining title must either join in relinquishment of the claim to the United States, or convey their individual interests in the claim to Steussy. Thereupon he may then file a relinquishment of the claim. The relinquishment of the claim cannot be filed subject to any conditions, but must be absolute in form. *Instructions*, 40 L. D. 397.

By the filing of such relinquishments, all question would be removed as to the propriety of allowing the homestead entry by reason of the existence of any mineral not subject to reservation. No good reason is seen for questioning the validity of the application on the ground that the applicant joined with others in endeavoring to establish that the land was mineral in character and to initiate a valid right of possession under the mining law, and, failing in that, to seek rights and a title under the law under which appropriate disposition thereof may be made.

The question of the mineral character of the land and preexistence of valid mining rights being resolved if the procedure above indicated is taken by the applicant, no reason appears why the application should not be considered as valid and as effectively segregating the land as of the date of the filing on May 8, 1934. Being a valid right then, it would not be affected by the general withdrawal of November 26, 1934. *Opinion of the Solicitor*, 55 I. D. 205, 210. The question of the imposition of a mineral reservation will be dependent upon the report and recommendations of the Geological Survey.

The decision of the Commissioner is modified accordingly and the case remanded for action in accordance with the views above expressed.

Modified.

**AUTHORITY OF PRESIDENT TO DISPOSE OF NATIONAL PARK
TIMBER FOR WAR PURPOSES AND TO ELIMINATE LANDS
ADDED TO OLYMPIC NATIONAL PARK BY PROCLAMATION**

Opinion, June 22, 1943

**PRESIDENT—WAR POWERS—NATIONAL PARKS—UTILIZATION OF TIMBER FOR WAR
PURPOSES—OLYMPIC NATIONAL PARK—ELIMINATION OF LANDS.**

It is doubtful whether the President may, pursuant to his war powers, authorize the disposition of timber within the Olympic National Park without regard to the prohibitions contained in the National Park statutes.

In the absence of authority from Congress, the President is without authority to vary the status of lands devoted by him to a specific use pursuant to Congressional authorization. Federal lands may be transferred between departments only by legislative authority. Since no legislative authority for change of use or transfer between departments exists in this case, the President is without authority to eliminate them from the Park and restore them to the National Forest.

GARDNER, Solicitor:

There have been referred to me two questions relating to the proposed disposition for war purposes of the Sitka spruce and other timber situated on lands added to the Olympic National Park by Proclamations 2380 of January 2, 1940, and 2587 of May 29, 1943, issued pursuant to section 5 of the act of June 29, 1938 (52 Stat. 1241, 16 U. S. C. sec. 255). Specifically, the questions are whether the President has authority—

1. To authorize directly the utilization of the park timber by private concerns with a view to making such timber available for war purposes; or

2. To eliminate in whole or in part those areas of the park added by proclamation and restore the lands to their former status as national forest lands in order to make the timber thereon available for commercial cutting and war use.

It is my opinion (1) that the second question must be answered in the negative and (2) that while the answer to the first question is not free from doubt, if this course is considered expedient, an order may be prepared and submitted to the President through the Attorney General.

1. In my memorandum opinion, M. 32006, of December 1, 1942, to Mr. Lee Muck, Assistant to the Secretary, I held that it is somewhat debatable whether the President may, pursuant to his war powers, authorize the disposition of timber within the Olympic National Park without regard to the prohibitions contained in the National Park statutes.

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My views on this question remain unchanged. Informal views elicited from the Department of Justice and the War Production Board are to the same effect. However, the question is one which would have to be passed on by the Attorney General should such an order be submitted to the President. If, therefore, it is considered administratively desirable to proceed by way of Executive order, upon being so advised, I shall be glad to prepare an appropriate Executive order and a memorandum to accompany it, which may then be submitted to the President through the Attorney General.

2. The lands in question were added to the Olympic National Park by the Executive proclamations issued pursuant to the act of June 29, 1938 (52 Stat. 1241, 1242, 16 U. S. C. sec. 255). By this act the President was authorized to add by proclamation "to the Olympic National Park any lands within the boundaries of the Olympic National Forest, and any lands which may be acquired by the Government by gift or purchase, which he may deem it advisable to add to such park; and any lands so added to such park shall, upon their addition thereto, become subject to all laws and regulations applicable to other lands within such park * * *."

The United States Constitution (Article IV, section 3) vests in Congress the "power to dispose of and make all needful rules and regulations respecting the territory or other property belonging to the United States * * *." Thus, the power to designate the use which shall be made of the Federal lands belongs to Congress. 10 Op. Atty. Gen. 359, 361. There can be no doubt that a designation of the use of Federal lands made by Congress pursuant to this power may not be altered or varied by Presidential action in the absence of Congressional sanction. 36 Op. Atty. Gen. 75, 76. To hold otherwise would be to say that the President has the authority to alter or repeal an act of Congress at will. The lands here in question, it is true, were added to the park by Presidential action. But this was done under a statute in which Congress expressly authorized the action and provided that when so added the lands should become a part of the park and subject to all laws and regulations applicable to the other park lands. This amounts to an express designation of the use of the lands by Congress itself since "a duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself." 10 Op. Atty. Gen. 359, 364; 39 Op. Atty. Gen. 185, 187. The President, therefore, has no more authority to alter or vary the use of lands designated by him pursuant to Congressional authorization than he has to alter or vary the use of lands prescribed by Congress itself. This is particularly true here since Congress in the statute authorizing the Presidential action ex-

pressly granted to the Presidentially added lands the same status as the lands which Congress itself had placed in the park. And the statute is completely silent with respect to any change in the status of either category of land.

The principle that, in the absence of authority from Congress, the President is without authority to vary the status of lands devoted by him to a specific use pursuant to Congressional authorization has been consistently applied by the Attorney General. 10 Op. Att'y. Gen. 359; 17 Op. Att'y. Gen. 168; 36 Op. Att'y. Gen. 75, 79; 39 Op. Att'y. Gen. 185. In 39 Op. Att'y. Gen. 187, the Attorney General, quoting from the opinion in 10 Op. Att'y. Gen., held:

"The grant of power to execute a trust, even discretionally, by no means implies the further power to undo it when it has been completed. A duty properly performed by the Executive under statutory authority has the validity and sanctity which belong to the statute itself, and, unless it be within the terms of the power conferred by that statute, the Executive can no more destroy his own authorized work, without some other legislative sanction, than any other person can. To assert such a principle is to claim for the Executive the power to repeal or alter an act of Congress at will. When the President, in the exercise of the discretion vested in him by the act of 1809, selected Rock Island as the site of a fort, and expended the money appropriated therefor in erecting the fort, and occupied it as a military station, thus setting it aside as a reservation for military purposes, the power conferred by the act was exhausted, and he had no more authority to recall that reservation, and restore the land to the condition of other portions of the public lands not so appropriated, than he would have had to expend the public money in erecting the fort without an appropriation by Congress for that purpose."

In Solicitor's opinion, M. 27657, of January 30, 1935, it was held that the President is impliedly authorized to eliminate lands from national monuments. This conclusion was subsequently in effect approved in 39 Op. Att'y. Gen. 185, 188, on the ground that the national monument act (16 U. S. C. sec. 431) impliedly authorizes an elimination of lands from monuments by the President in providing that the limits of such areas "in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected." No such implied authorization exists in the act here in question. The provision in that act prescribing the maximum park area clearly does not carry the same recognition of flexible boundaries, decreasing and expanding with changed conditions, that is contained in the monument act provision.

There is an additional reason why the President is without power to eliminate the lands in question from the Olympic National Park and restore them to the Olympic National Forest. Such action would involve a transfer of the lands from the Department of the Interior,

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which administers the national park, to the Department of Agriculture, which administers the national forest. The Attorney General has ruled that land cannot be transferred between Departments save by legislative authority. 28 Op. Atty. Gen. 143; 36 Op. Atty. Gen. 75. No legislative authority for this transfer exists. The general authority of the President to create and add to national forests (16 U. S. C. sec. 471) is not applicable here since this power was withdrawn by Congress as to lands in the State of Washington. 16 U. S. C. sec. 471(a).

I am of the opinion, accordingly, that the President may not eliminate the lands in question from the Olympic National Park and restore them to their former status as national forest lands.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

PHYSICIAN'S PRIVILEGE IN CONGRESSIONAL INVESTIGATION

Opinion, June 23, 1943

AUTHORITY OF CONGRESSIONAL INVESTIGATING COMMITTEE—SCOPE OF PHYSICIAN'S PRIVILEGE.

The privilege of a physician with respect to confidential medical data of a personal character may be asserted in an investigation by a Congressional Committee; such privilege, however, does not extend to general surveys, reports, or other materials in which the personal character of such data is lost.

GARDNER, *Solicitor:*

You [Assistant Secretary] have asked my advice concerning the extent to which Dr. A. H. Leighton, Lt. (M. C.) U. S. N. R., may claim a physician's privilege with respect to confidential data relating to Poston internees, in the event that he is instructed by the House Committee on Un-American Activities to make a general disclosure of data in his possession.

I am of the opinion that such privilege may properly be claimed with respect to confidential disclosures of a medical (including psychiatric) character made to Dr. Leighton by internees whom he has examined, but that such privilege does not extend to general surveys, reports, or other materials in which the personal character of such disclosures is lost.

In order to give this general conclusion greater clarity and precision it is necessary to trace briefly the factual background and the legal authorities relevant to the question presented.

1. Factual Background

The assignment of Dr. A. H. Leighton to conduct a series of examinations of internees at Poston, Arizona, was made, I am informed, in the belief that special psychological and psychiatric maladjustments had developed, or were likely to develop, under the peculiar circumstances of this large-scale internment, that such psychic maladjustments might be expected to assume mass, as well as individual, manifestations, and that effective methods of preventing, minimizing, or treating these maladjustments would be definitely in the interests of the Government as well as of the internees themselves. Upon this basis Dr. Leighton, a medical practitioner with special competence in psychiatry, was assigned to carry out necessary examinations. He found himself unable to secure essential information from individual internees unless he was in a position to give them professional assurance that personal information so furnished would not become public property but would be treated as his own personal property and would be maintained in the same confidential status which generally attaches to a private physician's records of disclosures by his patients. In order to meet this situation, Dr. Leighton was authorized, by letter dated November 14, 1942, signed by Assistant Commissioner William Zimmerman and approved by Assistant Secretary Oscar L. Chapman, to enter into the following agreement with internees examined and interviewed:

The information contained in the attached notes is furnished to the Sociological Research Project, Poston, Arizona, on the understanding that except for such scientific use as may be made of them by the said project the notes are confidential and are to be held as the personal property of Dr. A. H. Leighton, or of such scientific agency, selected by him, as may agree to maintain these notes in a confidential status for scientific use only. Such notes shall at no time be available to inspection for other than purely scientific purposes.

Pursuant to the foregoing understanding, individual data sheets have, I understand, been kept confidential and maintained as the private property of Dr. Leighton. At the same time, the general reports and memoranda which embody and condense such data in impersonal form have been handled as Government papers. Such papers have been generally treated as confidential documents but not as private or personal possessions.

2. Applicable Law

My conclusion that personal data sheets are, under a claim of physician's privilege, exempt from inspection by a Congressional committee but that other documents utilizing such data are subject to such inspection is based upon a consideration of four legal issues:

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(1) The existence of a Congressional power to require the production of evidence; (2) the limitations of such Congressional power; (3) the extent to which Congress has exercised such power in this case, and particularly whether such exercise is compatible with the assertion of a physician's privilege; and (4) the scope of such physician's privilege.

1. *Congressional Power.* It is now firmly established that Congress is constitutionally endowed with power to compel production of evidence relevant to its investigations into matters of legislative concern. *McGrain v. Daugherty*, 273 U. S. 135; *Sinclair v. United States*, 279 U. S. 263; *Townsend v. United States*, 95 F. (2d) 352 (App. D. C.).

2. *Limitations of Congressional Power.* Inasmuch as the power to compel production of such evidence is, on the one hand, not expressly granted by the Constitution and, on the other, a limitation upon individual rights generally protected by law, this constitutional power is held to extend no further than is reasonably necessary to the exercise of the legislative function. "It is a limited power, and should be kept within its proper bounds; and, when these are exceeded, a jurisdictional question is presented which is cognizable in the courts." (*People v. Keeler*, 99 N. Y. 463, 482, quoted in *McGrain v. Daugherty*, *supra*, at 166.) On this point the Supreme Court has said:

The contention is earnestly made on behalf of the witness that this power of inquiry, if sustained, may be abusively and oppressively exerted. If this be so, it affords no ground for denying the power. The same contention might be directed against the power to legislate, and of course would be unavailing. We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. But if, contrary to this assumption, controlling limitations or restrictions are disregarded, the decisions in *Kilbourn v. Thompson* and *Marshall v. Gordon* point to admissible measures of relief. And it is a necessary deduction from the decisions in *Kilbourn v. Thompson* and *In re Chapman* that a witness rightfully may refuse to answer where the bounds of the power are exceeded or the questions are not pertinent to the matter under inquiry. [*McGrain v. Daugherty*, *supra*, at pp. 175-176. To the same effect see *Sinclair v. United States*, *supra*; *Kilbourn v. Thompson*, 103 U. S. 168; *In re Chapman*, 166 U. S. 661; *Marshall v. Gordon*, 243 U. S. 521.]

3. *Exercise of Congressional Power.* Within the constitutional limits to which the opinions above cited point, it is for Congress to decide how far its investigations shall respect the privileges, e. g., those of priest, lawyer, and physician, which are ordinarily respected in courts of law. The House Resolution, however, which established the Dies Committee on Un-American Activities (H. Res. 282, May

26, 1938, 83 Cong. Rec. 7568)* is silent on the question of what privileges, if any, may be claimed by witnesses before this committee. It is therefore necessary to inquire into those considerations that may be helpful in interpreting the silence of Congress on this point.

We must begin by recognizing that the reasons of policy justifying the privileges of priests, doctors, and lawyers are as compelling outside as inside the courtroom. The right of privacy is certainly as much invaded by disclosure of confidential communications to a Congressional committee as by disclosure to a court of law. Such confidential communications as are privileged even in capital cases, where knowledge of their contents might decide an issue of life or death, are privileged not because they would be valueless in a judicial inquiry, but because it is thought that in the long run the violation of certain professional confidences would do harm outweighing any immediate advantages to be derived therefrom. As the Supreme Court said in the *Sinclair* case—

It has always been recognized in this country, and it is well to remember, that few if any of the rights of the people guarded by fundamental law are of greater importance to their happiness and safety than the right to be exempt from all unauthorized, arbitrary or unreasonable inquiries and disclosures in respect of their personal and private affairs. [*Supra*, at p. 292]

And in the case of *Interstate Commerce Commission v. Brimson*, 154 U. S. 447, the Court declared:

We do not overlook these constitutional limitations which, for the protection of personal rights, must necessarily attend all investigations conducted under the authority of Congress. Neither branch of the legislative department, still less any merely administrative body, established by Congress, possesses, or can

* "Resolved, That the Speaker of the House of Representatives be, and he is hereby, authorized to appoint a special committee to be composed of seven members for the purpose of conducting an investigation of (1) the extent, character, and objects of un-American propaganda activities in the United States, (2) the diffusion within the United States of subversive and un-American propaganda that is instigated from foreign countries or of a domestic origin and attacks the principle of the form of government as guaranteed by our Constitution, and (3) all other questions in relation thereto that would aid Congress in any necessary remedial legislation.

"That said special committee, or any subcommittee thereof, is hereby authorized to sit and act during the present Congress at such times and places within the United States, whether or not the House is sitting, has recessed, or has adjourned, to hold such hearings, to require the attendance of such witnesses and the production of such books, papers, and documents, by subpoena or otherwise, and to take such testimony as it deems necessary. Subpoenas shall be issued under the signature of the chairman and shall be served by any person designated by him. The Chairman of the committee or any member thereof may administer oaths to witnesses. Every person who, having been summoned as a witness by authority of said committee, or any subcommittee thereof, willfully makes default, or who, having appeared, refuses to answer any question pertinent to the investigation heretofore authorized, shall be held to the penalties provided by section 102 of the Revised Statutes of the United States (U. S. C., title 2, sec. 192)."

Since the creation of this committee it has been continued by resolutions which do not alter the scope of its authority. See 84 Cong. Rec. 1128, 86 *ibid.* 605, 87 *ibid.* 899, 88 *ibid.* 2297, and 89 *ibid.* 809-810.

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be invested with, a general power of making inquiry into the private affairs of the citizen. * * * We said in *Boyd v. United States*, 116 U. S. 616, 630,—and it cannot be too often repeated,—that the principles that embody the essence of constitutional liberty and security forbid all invasions on the part of the Government and its employes of the sanctity of a man's home, and the privacies of his life. [At p. 478]

Courts of law have liberally construed and faithfully respected the limitations upon their own procedures which are established by statutes, by rules of the common law, and by constitutional principles, limitations which safeguard the right of privacy. Since the underlying reasons for these limitations are as applicable to legislative as to judicial inquiries it is reasonable to assume that Congress, unless it otherwise expressly provides, expects its investigating committees to accept the limitations that courts accept with respect to the examination of persons entitled to assert such privileges. This view is implicit in several opinions of the Supreme Court. In the *Daugherty* case the Court said:

We must assume, for present purposes, that neither house will be disposed to exert the power beyond its proper bounds, or without due regard to the rights of witnesses. [At pp. 175-176]

A similar statement is found in the opinion of the Court in the *Sinclair* case (*supra*, at pp. 291-292). Since there are no statutes establishing rights of witnesses in Congressional inquiries, it can only be concluded that the "rights of witnesses" to which the Court referred in the passage cited are the rights which witnesses may assert in courts of law.

These considerations are reinforced by the suggestion of the Court, *per Holmes, J.*, that any attempt to delegate to a commission an unlimited power of investigation would raise a serious constitutional question: "Whether it [Congress] could delegate the power, if it possesses it, we also leave untouched, beyond remarking that so unqualified a delegation would present the constitutional difficulty in most acute form. It is enough for us to say that we find no attempt to make such a delegation anywhere in the act." *Harriman v. Interstate Commerce Comm.*, 211 U. S. 407.

Further support for these views as to Congressional intent is provided by the fact that Congress itself has enacted a very modest and limited statute to the effect that no witness before a Congressional committee shall be privileged to decline to testify or to produce papers "upon the ground that his testimony to such fact or his production of such paper may tend to disgrace him or otherwise render him infamous." 2 U. S. C. sec. 193. In rejecting the assertion of a spurious privilege, Congress implicitly recognized the existence of

privileges in witnesses before committees and demonstrated the recourse it might take if such privileges should ever seriously impede Congressional investigation.

Decisions of State courts give general support to the views expressed in the Supreme Court opinions already quoted, and apply these views specifically to the assertion of a physician's privilege. In *Hirshfield v. Henley*, 228 N. Y. 346, 127 N. E. 252, the New York Court of Appeals laid down the general rule—

Those who are made witnesses in virtue of those powers are entitled to all the privileges and protection extended by the law to witnesses in judicial proceedings, and the courts should and will be quick and firm in halting the exercise of those powers for irrelevant, illegitimate, or oppressive examinations or purposes.

This rule was applied in the recent case of *New York City Council v. Goldwater*, 284 N. Y. 296, 31 N. E. (2d) 31, which held that a physician's privilege could be invoked against an investigating committee appointed by the City Council of the City of New York, seeking to subpoena hospital records containing confidential information relating to the condition of patients. The court declared, *per Lehman, C. J.*:

The statutory privilege was conferred upon a physician by 2 Revised Statutes ([1st ed. 1829] p. 406, sec. 73). This court has pointed out that the revisers in their notes say: "Unless such conversations are privileged men will be incidentally punished by being obliged to suffer the consequences of injuries without relief from the medical art, and without conviction of any offense. Besides, in such cases, during the struggle between legal duty on the one hand, and professional honor on the other, the latter aided by a strong sense of the injustice and inhumanity of the rule, will, in most cases, furnish a temptation to the perversion or concealment of the truth, too strong for human resistance." *People v. Austin*, 199 N. Y. 446, at pages 451, 452, 93 N. E. 57, at page 59. The Legislature which has conferred the privilege may, if it chooses, limit its application. The courts may not do so.

The question of whether the privilege of a physician or a minister of religion may be asserted by a witness under a subpoena issued by a legislative committee or a person clothed with powers to hold investigations to compel the attendance of witnesses has never been directly presented to this court, but we have said that: "Those who are made witnesses in virtue of those powers are entitled to all the privileges and protection extended by the law to witnesses in judicial proceedings." *Matter of Hirshfield v. Henley*, 228 N. Y. 346, 349, 127 N. E. 252. We now hold that the statutory privilege may be asserted whenever the power of a court is invoked in manner authorized by the provisions of article 33 of the Civil Practice Act to compel a witness to disclose information which under other provisions of the same article he is forbidden to disclose. Cf. *Matter of Doyle*, 257 N. Y. 244, 177 N. E. 489, 87 A. L. R. 418; *McMann v. Securities and Exchange Commission*, 2 Cir., 87 F. 2d 377, 109 A. L. R. 1445.

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In view of these authorities, I think it clear that Congress, in establishing the Dies Committee, did not intend to confer upon that committee greater powers over witnesses than could be exercised by courts of law, and that Dr. Leighton is therefore entitled to claim a physician's privilege with respect to all matters which would be privileged in a law court.

4. *Scope of Physician's Privilege.* Assuming that a physician's privilege has the same status in a legislative inquiry as in a court of law, there remains the task of outlining the purview of this privilege and its application to the facts here under consideration.

It must be noted, in the first place, that the physician's privilege is a statutory, rather than a common law, privilege and that the statutes on this subject adopted by some 42 jurisdictions * vary somewhat among themselves. The statutes of Arizona, California, and the District of Columbia on this point are generally similar to those of most other jurisdictions.

The Arizona Law provides:

A physician or surgeon can not be examined, without the consent of his patient, as to any communication made by his patient with reference to any physical or supposed physical disease or any knowledge obtained by personal examination of such patient. [Arizona Code of Civil Procedure (1939), sec. 23-103, par. 6.]

The California law provides:

Confidential communications. There are particular relations in which it is the policy of the law to encourage confidence and to preserve it inviolate; therefore, a person cannot be examined as a witness in the following cases:

* * * * *

4. *Physician and patient.* A licensed physician or surgeon cannot, without the consent of his patient, be examined in a civil action, as to any information acquired in attending the patient, which was necessary to enable him to prescribe or act for the patient; * * *. [California Code of Civil Procedure, section 1881.]

The Act of Congress for the District of Columbia provides:

In the courts of the District of Columbia no physician or surgeon shall be permitted, without the consent of the person afflicted, or of his legal representative, to disclose any information, confidential in its nature, which he shall have acquired in attending a patient in a professional capacity and which was necessary to enable him to act in that capacity, whether such information shall

* Wigmore lists the following jurisdictions: Alaska, Arizona, Arkansas, California, Canal Zone, Colorado, District of Columbia, Georgia, Hawaii, Idaho, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Mexico, New York, North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Pennsylvania, Philippines, Puerto Rico, South Carolina, South Dakota, Tennessee, Texas, Utah, Virgin Islands, Washington, Wisconsin, Wyoming. (*Evidence* (1940 ed.) sec. 2380.)

have been obtained from the patient or from his family or from the person or persons in charge of him: *Provided*, That this section shall not apply to evidence in criminal cases where the accused is charged with causing the death of, or inflicting injuries upon a human being, and the disclosure shall be required in the interests of public justice. [District of Columbia Code, 1940, tit. 14, sec. 308.]

Since the situation presented for my consideration would appear to be covered by each of the foregoing statutes and generally by the legislation of a majority of the States of the Union, it is unnecessary for present purposes to determine whether the House Committee on Un-American Activities is, in the absence of Congressional legislation on the point, bound, like the Federal courts, to conform to the law of the jurisdiction in which it sits, or whether it is bound generally, wherever it sits, by what may be considered a prevailing rule of evidence in the United States.

Typically, the privilege in question is subject to waiver by the patient rather than by the physician. Where the privilege has not been waived, it protects data of the general character which I understand to be involved in Dr. Leighton's personal data sheets, but not the generalized information contained in his reports and general studies. The decision as to whether any particular item of information falls within the statutory rules above cited should be made, in the first instance, by Dr. Leighton, in view of his complete familiarity with the facts of the case. I shall, of course, be glad to offer further specific advice, supplementing the foregoing general expressions, as to the extent to which any specific data for which request has been made may fall within the protective scope of the physician's privilege.

USE FOR DOMESTIC PURPOSES OF RIGHT-OF-WAY RESERVED UNDER THE ACT OF AUGUST 30, 1890, FOR THE CARRIAGE OF WATER THROUGH PIPE LINES

Opinion, August 9, 1943

STATUTORY CONSTRUCTION—RIGHT-OF-WAY FOR DITCHES AND CANALS—AUTHORITY TO CONVEY WATER FOR DOMESTIC USE.

A right-of-way under section 1 of the act of August 30, 1890 (26 Stat. 391, 43 U. S. C. sec. 945), is not limited in its use to the transportation of water for irrigation purposes but may be used to carry water for domestic purposes.

WORDS AND PHRASES.

The term "canals" as used in the act includes pipe lines used to transport water.

August 9, 1943

COHEN, *Acting Solicitor*:

At the request of the Acting Director of the National Park Service you have asked my opinion with respect to whether rights-of-way reserved under the proviso to section 1 of the Sundry Civil Appropriations Act of August 30, 1890 (26 Stat. 391, 43 U. S. C. sec. 945), are available to the National Park Service for the conveyance of water to be used primarily for domestic purposes at campgrounds, hotels and administrative units of parks or monuments, and if so, whether the construction of a pipe line in lieu of a ditch or canal is authorized.

I am of the opinion that such rights-of-way may be utilized for the purpose and in the manner stated.

The proviso reads as follows:

* * * in all patents for lands hereafter taken up under any of the land laws of the United States or on entries or claims validated by this act west of the one hundredth meridian, it shall be expressed that there is reserved from the lands in said patent described, a right-of-way thereon for ditches or canals constructed by the authority of the United States.

Assuming as I do, that the means for the conveyance of water to which the National Park Service refers would be "constructed by the authority of the United States," a literal reading of the proviso would lead to the conclusion that rights-of-way for water ditches or canals for domestic purposes within the park system would be reserved. The words of the proviso, "a right of way thereon for ditches or canals," are general and unlimited; there is no requirement that the canal or ditch be used for any particular purpose.

Congress in previous legislation had recognized the importance of water as a factor in the development of the arid West and in recognizing the right of miners and others to convey water across public lands it gave no preference to any particular use. Act of July 26, 1866 (14 Stat. 253, 43 U. S. C. sec. 661). And in acts passed subsequent to 1890 granting rights-of-way for the carriage of water it has recognized all uses. Act of March 3, 1891, as amended by the act of May 11, 1898 (30 Stat. 404, 43 U. S. C. sec. 956), act of February 15, 1901 (31 Stat. 790, 43 U. S. C. sec. 959), and act of February 1, 1905 (33 Stat. 628, 16 U. S. C. sec. 524).

The related context of the appropriation act of which the proviso is a part, and the legislative history, contain nothing that would require a construction limiting the application of the proviso to ditches and canals constructed for irrigation purposes. It is attached to an appropriation for topographic surveys with a direction that one-half of the sum provided shall be used west of the 100th meridian. The previous Sundry Civil Act of October 2, 1888 (25 Stat. 526), had

reserved public lands suitable for reservoirs, canals and ditches for irrigation purposes and this proviso was repealed by the 1890 act except as to reservoir sites already selected. But although provision was then made for the selection of other reservoir sites for irrigation purposes the proviso relating to canals and ditches contained no such limitation. In view of the close relationship between the proviso and the repeal of the reservation clause of the 1888 act and in view of the general policy of Congress with respect to the conveyance of water for beneficial uses the omission of the restriction in the right-of-way proviso is significant. So too is the fact that the repeal of the prior legislation was itself effected solely for the purpose of removing restrictions upon the orderly settlement and development of the arid lands.

It is, and in 1890 was, commonly known that in many areas within the arid regions water must be transported for domestic and other purposes besides irrigation, that horses and cattle are necessary adjuncts of most farming communities, and that market centers ordinarily follow the development of agriculture in frontier regions. In the absence of express language of limitation, or language compelling an implied limitation, we should not assume that Congress intended to provide exclusively for the carriage of water for irrigation and thus to impose an additional burden upon the very communities which it hoped that this legislation would result in establishing.

Subsequent legislation also is indicative of a broader purpose. The act of April 16, 1906 (34 Stat. 116, 43 U. S. C. sec. 561), provides for reclamation town sites and authorizes the use of water from irrigation projects by any towns established pursuant to that act. In addition, the act of February 25, 1920 (41 Stat. 451, 43 U. S. C. sec. 521), authorizes the use of such water broadly "for other purposes than irrigation." These, being general acts, would apply to waters conveyed over rights-of-way reserved under authority of the proviso. Thus they amount to a legislative construction of the proviso.

Administrative and other practice since the enactment of the proviso is not adverse to the conclusion I have reached. The Bureau of Reclamation sells water from irrigation projects for domestic use by civilians and by army camps, for factories, and for the use of towns. The statute has been used for water power purposes and for other purposes as well. Irrigation systems in the West serve quite generally to supply water to animals as well as plants, and to humans as well as animals.

The proviso has been judicially construed in relation to its purpose only in cases directly involving irrigation. *Ide et al. v. United States*, 263 U. S. 497, 501; *United States v. Van Horn*, 197 Fed. 611,

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615; *United States ex rel. Southern Pacific Railroad Company v. Lane*, 46 App. D. C. 74, 80; *Dopps v. Alderman*, 121 P. (2d) 388, 391. These cases hold that the proviso covers ditches and canals for irrigation purposes, but they do not involve the question whether the proviso is limited to those purposes. They are not, accordingly, inconsistent with the view that the proviso embraces ditches and canals for domestic purposes. Nor is an opinion of the Comptroller General of May 31, 1938, 17 Comp. Gen. 1036, 1038, inconsistent with that view. It was there held that payment could not be made for a right-of-way for an irrigation canal on the international boundary line between the United States and Mexico because the right-of-way for such purpose had been reserved to the United States by the proviso but that this was not true as to areas adjacent to the canal which were acquired and used as sites for levees to control floods. Obviously the proviso does not include rights-of-way for structures other than ditches and canals. Its object is the conveyance of water for beneficial use and not the protection of land from inundation.

It also seems clear that a pipe line may be used instead of a ditch to convey the water over a reserved right-of-way. The term "canal" is broadly defined as "an artificial watercourse," which definition also applies to pipe lines. See *Fraser Sources Irrigation and Power Co.*, 43 L. D. 110.

You are advised accordingly that a right-of-way reserved by the act of August 30, 1890 (26 Stat. 391, 43 U. S. C. sec. 945), may be used to convey water through a pipe line for domestic purposes in national parks and monuments.

Approved:

OSCAR L. CHAPMAN,

Assistant Secretary.

AUTHORITY OF FIELD EXAMINERS OF GENERAL LAND OFFICE TO ADMINISTER OATHS

Opinion, August 10, 1943

OATHS—BRANCH OF FIELD EXAMINATION OF GENERAL LAND OFFICE—ACT OF OCTOBER 14, 1940—AUTHORITY TO EXECUTE JURATS.

Field examiners of the Branch of Field Examination in the General Land Office are authorized by the act of October 14, 1940 (54 Stat. 1175, 5 U. S. C. sec. 498), to administer oaths in the performance of their official duties. Departmental Order No. 1639 of January 17, 1942, reallocating functions of the Division of Investigations to the Branch of Field Examination in the General Land Office carried with it the authority to administer oaths under the act of October 14, 1940.

The act of October 14, 1940, grants authority to administer oaths "when-ever necessary in the performance of * * * official duties." Since these duties are investigatory in nature, the authority to administer oaths is incidental to the investigatory function and therefore the act of October 14, 1940, confers no authority to execute jurats attached to applications for public lands.

COHEN, *Acting Solicitor*:

My opinion has been requested as to whether field examiners of the Branch of Field Examination in the General Land Office are authorized to administer oaths and take affirmations, affidavits or depositions whenever necessary in the performance of their official duties under authority of the act of October 14, 1940, and whether, if this question is answered in the affirmative, such examiners are authorized to execute jurats to applications for public lands for applicants.

It is my opinion that the first question should be answered in the affirmative; the second, in the negative.

1. The history of the General Land Office shows that from its beginning it has been charged with the duty to discover and to assist in punishing fraud and attempted fraud against the Government arising out of the administration of the laws relating to the public lands. For years, the General Land Office appropriations included a fund designated for the following purposes:

Depredations on public timber, protecting public lands, and settlement of claims for swamp land and swamp-land indemnity: For protecting timber on the public lands, and for the more efficient execution of the law and rules relating to the cutting thereof; protecting public lands from illegal and fraudulent entry or appropriation, adjusting claims for swamp lands and indemnity for swamp lands * * *.

To accomplish these purposes the General Land Office employed agents to make investigations in the field. At times such agents constituted a field service of the General Land Office and at other times they were included in a general investigating service for the entire Department of the Interior.

The last of a number of consolidations of the field service of the General Land Office into a unified departmental investigating service was effected by a departmental order of April 27, 1933 (Order No. 621), which provided that the field service of the General Land Office and the investigating forces in other divisions and bureaus of the Department should be consolidated into a Division of Investigations and the employees in those positions, to be known thereafter as special agents, should be detailed to the Office of the Secretary. The result of such action was the centralization of the investigating functions of the Department in an agency established and entrusted

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with the performance of a particular function by the Secretary pursuant to his authority to prescribe regulations for the distribution and performance of the business of the Department (Rev. Stat. sec. 161, 5 U. S. C. sec. 22).

During the years 1934 to 1941, inclusive, each enactment of Congress appropriating money for the Department of the Interior contained an appropriation, carried under the head of Division of Investigations, which was designated—

For investigating official matters under the control of the Department of the Interior; for protecting timber on the public lands, and for the more efficient execution of the law and rules relating to the cutting thereof; for protecting public lands from illegal and fraudulent entry or appropriation; for adjusting claims for swamp lands and indemnity for swamp lands; and for traveling and other expenses * * *

Until 1940, these investigating agents had only such authority to administer oaths as was conferred upon them by the general act of March 2, 1901 (31 Stat. 951, 5 U. S. C. sec. 93), which authorized any officer or clerk of any department detailed to investigate frauds or attempts to defraud the Government or irregularity or misconduct of an officer or agent of the United States, to administer oaths to witnesses attending to testify or depose in the course of such investigation.

Many investigations made by agents of the Department do not involve fraud. For this reason the act of October 14, 1940 (54 Stat. 1175, 5 U. S. C. sec. 498), was enacted. It provides:

That special agents and such other employees of the Division of Investigations, Department of the Interior of the United States, as are designated by the Secretary of the Interior for that purpose, are authorized and empowered to administer to or take from any person an oath, affirmation, affidavit, or deposition whenever necessary in the performance of their official duties. Any such oath, affirmation, affidavit, or deposition administered or taken by or before a special agent or such other employee of the Division of Investigations, Department of the Interior, designated by the Secretary of the Interior, when certified under his hand, shall have like force and effect as if administered or taken before an officer having a seal.

On January 17, 1942, by Departmental Order No. 1639 the Secretary of the Interior divided the functions of the Division of Investigations and reallocated them to the Branch of Field Examination in the General Land Office, which was directed to conduct the field examinations of that office and of such other agencies as might be best served by such organization, and the staff of Field Representatives, attached directly to the Office of the Secretary, which was directed to make over-all studies and perform such field examining work as the Secretary should direct. The order further directed

that the staffs of these organizational units, office space, official papers, files and equipment should be supplied by the Division of Investigations under directions to be made thereafter.

Pursuant to the Secretary's order of January 17, 1942, the First Assistant Secretary detailed the employees of the Division of Investigations to the Staff of Field Representatives of the Secretary's Office, the Branch of Field Examination in the General Land Office and the Classification Division of the Secretary's Office for a period not to extend beyond the period covered by existing appropriations, or June 30, 1942. After that date, permanent transfers of personnel were made to these and other agencies of the Department.

In the act of July 2, 1942, which made appropriations for the Department of the Interior for the fiscal year ending June 30, 1943, there was no mention of the Division of Investigations but provisions for the General Land Office included an appropriation for the Branch of Field Examination which was designated—

For salaries and expenses of field examinations, classification of lands, and investigations required in the administration and execution of the public land laws, and the protection of the public lands and their resources from trespass * * *. [56 Stat. 508, 511]

It is apparent, therefore, that the functions of the Division of Investigations were continued in the Branch of Field Examination and the staff of Field Representatives under the Secretary's direction. Thereafter Congress recognized the Branch of Field Examination in the General Land Office and empowered it to perform a portion of the functions previously performed by the Division of Investigations, by means of an appropriation of funds designated for that purpose.

It is recognized that a department head may rename an agency of his department thereby discarding a name previously employed by Congress to designate that agency (24 Op. Atty. Gen. 297), but that he cannot transfer to another agency authority granted by Congress to a particular agency (30 Op. Atty. Gen. 199; 29 Op. Atty. Gen. 247; 27 Op. Atty. Gen. 542), unless, of course, the statutory grant of authority is broad enough to include such agency. Whether the grant of authority to administer oaths conferred upon the Division of Investigations by the act of October 14, 1940, is sufficiently broad in its scope to include the Branch of Field Examination must be determined by a consideration of the language of that act, the circumstances of its enactment and the relation of the Branch of Field Examination to the Division of Investigations.

The language of the act specifies agents of a division of the Department of the Interior designated by name, but there is nothing in the act or its legislative history which indicates that there was

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any intent actually to restrict the authority conferred to the designated agency. The purpose of the act was to implement the authority of persons engaged in the investigating work of the Department to the end that this function might be more effectively performed. It happened that at that time this function was being performed by the special agents of the Division of Investigations pursuant to departmental order and circumstances indicate that it was for this reason that the recipients of the authority to administer oaths were so designated.

The letter of the Acting Secretary of the Interior recommending passage of the bill (H. Rept. 2570, 76th Cong., 3d sess., and S. Rept. 851, 76th Cong., 1st sess.), stated specifically:

The duties of the special agents include the investigation and taking of testimony relating to the protection of the public domain, as well as preventing frauds against the Government on the part of persons having dealings with the various bureaus and offices of the Department. It is necessary, therefore, that interviews be had with persons who possess knowledge concerning the issues involved, and it is believed that the evidence obtained from them would be of greater value if taken under oath. At times the special agents hold hearings on contested homestead entries and should be authorized to administer oaths to witnesses who appear before them.

This is clearly a request for authority to administer oaths commensurate with the investigating authority of Department employees engaged in the function of making investigations.

In the House debate on the question of acceptance of the conference committee report which restored the bill to its original form after a House amendment had struck out the provision giving the Secretary authority to designate other employees in addition to special agents, proponents of the bill pointed out by specific reference to field investigations relating to public lands that it was intended to enable employees of the Department who conduct investigations to reduce the evidence obtained in the course of such investigations to sworn statements (Cong. Rec., vol. 86, pt. 12, p. 13338). This indicates that Congress intended that the authority conferred by the act of October 14, 1940, should be an incident of the authority pertaining to the performance of the basic function of investigation and should be exercised by the agency performing the function rather than that it should be limited to the particular agency then performing that function.

The appropriation act of July 2, 1942, which provided funds for salaries and expenses of the Branch of Field Examination, specifically ratified the action of the Secretary in assigning to that agency the duty of making investigations required in the administra-

tion of the public land laws and the protection of the public lands and their resources. This activity comprises the greater portion of the investigating function which was implemented by the act of October 14, 1940. The changes effected by the departmental order of January 17, 1942, were changes of designation and redistribution of duties only, with no interruption of the function which Congress intended to implement by conferring authority to administer oaths. It follows that the authority to administer oaths is appendant to the exercise of the investigating function now performed by the field examiners of the Branch of Field Examination.

I conclude, therefore, that the field examiners of the Branch of Field Examination in the General Land Office possess authority to administer oaths in the performance of their official duties under the act of October 14, 1940.

2. The act of October 14, 1940, grants authority to administer oaths "Whenever necessary in the performance of their official duties." Since these duties are investigatory in nature it is apparent that the authority to administer oaths is incidental to the investigatory function and finds its usual mode of expression in the taking of testimony in the form of an affidavit or deposition. As heretofore pointed out, the enactment of October 14, 1940, was intended to permit such testimony to be taken under oath. A jurat attached to an application for public lands indicates the time and the person before whom the application was sworn to, but does not purport to contain the results of an investigation conducted by a field examiner. It can hardly be supposed, therefore, that the act of October 14, 1940, confers authority to execute jurats attached to applications for public lands.

Further, by the enactment of laws designating the officials before whom proofs, affidavits and other oaths required to be made under the laws relating to private acquisition of public lands shall be made,¹ Congress has evidenced its intent that the authority to administer oaths in such instances shall be limited to the officials specifically designated by law and not extended by implication or construction to anyone who may conveniently do so.

It is my opinion, therefore, that the authority of the Branch of Field Examination to administer oaths under the act of October 14,

¹ Act of June 12, 1840 (Rev. Stat. sec. 2246, 43 U. S. C. sec. 75), act of May 17, 1926 (44 Stat. 558, 43 U. S. C. sec. 75a), act of September 4, 1841 (Rev. Stat. sec. 2262), act of September 16, 1850 (Rev. Stat. sec. 1778, 5 U. S. C. sec. 92), act of July 3, 1926 (44 Stat. 830, 5 U. S. C. sec. 92a), act of March 21, 1864 (Rev. Stat. sec. 2294, 43 U. S. C. sec. 254), act of May 10, 1872 (Rev. Stat. sec. 2335, 30 U. S. C. sec. 40), act of June 3, 1878 (20 Stat. 89, 43 U. S. C. sec. 312).

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1940, does not extend to execution of a jurat attached to an application for public lands.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

DELEGATION BY THE SECRETARY OF THE INTERIOR IN THE FIELD OF INDIAN AFFAIRS

Opinion, August 26, 1943

DELEGATION OF ADMINISTRATIVE POWER—DELEGATIONS BY SECRETARY OF THE INTERIOR TO HEADS OF BUREAUS.

The Secretary, as the head of the Department of the Interior, has the general power of delegating those functions that fall within the province of the various bureaus of the Department to the respective heads of such bureaus, even though the discharge of such functions involves the exercise of judgment or discretion. This power is derived not only from section 161 of the Revised Statutes but also from the multifarious character of the duties of the Secretary, and the relationship between the Secretary and the heads of the bureaus. The vesting of a power in the "Secretary" rather than the "Department" of the Interior is usually not significant since these terms are as a rule used interchangeably in legislation and legislative debate.

DELEGATION OF ADMINISTRATIVE POWER—INDIAN LANDS—SALE OF ALLOTTED LANDS AND INHERITED INTERESTS IN ALLOTTED LANDS.

The Secretary of the Interior may, subject to existing rules and regulations and the decisions and practices of the Department, delegate to the Commissioner of Indian Affairs his powers in connection with the alienation of Indian lands. Undue weight should not be given to variations of phraseology in the relevant statutes since the administration of Indian property should be considered as a single activity dominated by common conceptions of policy in particular phases of its history. The debates concerning the relevant legislation and the size of the subsequent appropriations to carry it out reveal a full awareness on the part of Congress that the real decisions as to the alienation of Indian property were made in the Indian Office, and that they were departmental rather than personal. Although some of the early statutes require the Secretary's "approval," such a provision should be regarded only as equivalent to the requirement that the action to be taken should be left to the Secretary's discretion,—a form of provision which does not in itself prevent delegation by the head of a department. Although the act of March 1, 1907 (34 Stat. 1015, 1018, 25 U. S. C. sec. 405), and section 1 of the act of May 29, 1908 (35 Stat. 444, 25 U. S. C. sec. 404), entrust the management of the proceeds derived from any disposition to the Commissioner of Indian Affairs, it would be misleading to imply a presumption against delegation of a function entrusted to the Secretary merely because another has been entrusted to

the Commissioner, especially since the separate allocation of each of the functions does not prevent the Secretary from exercising both, and its only practical effect is to enable the Commissioner to act without awaiting instructions from the Secretary. It is significant that section 1 of the final act of June 25, 1910 (36 Stat. 855, 25 U. S. C. sec. 372), contains the provision: "All sales of lands allotted to Indians authorized by *any* other Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe,"—a form of provision which clearly supports a power of delegation. While the alienation of restricted land is a matter of more than routine importance, and the Indian is a ward of the United States, these considerations go only to the policy of delegation. If regarded as decisive in determining the legal power to delegate, they would prevent any delegation in the field of Indian affairs.

DELEGATION OF ADMINISTRATIVE POWER—INDIAN LANDS—DETERMINATION OF HEIRSHIP AND APPROVAL OF WILLS.

Under sections 1 and 2 of the act of June 25, 1910 (36 Stat. 855, 856, 25 U. S. C. secs. 372 and 373), and the act of December 24, 1942 (56 Stat. 1080), the Secretary of the Interior may, subject to appeal to himself, delegate to the Commissioner of Indian Affairs power to determine heirs and approve wills, under applicable regulations, which prescribe the governing factors and the procedure in minute detail. While this function of the Secretary is quasi-judicial, it has little or no discretionary aspect. The original requirement of section 2 of the act of June 25, 1910, that wills must be approved by the Commissioner of Indian Affairs, as well as by the Secretary of the Interior, was repealed by the act of February 14, 1913 (37 Stat. 678, 25 U. S. C. sec. 373), and the repeal must be regarded as deliberate. Moreover, the motive originally may have been not so much to secure the personal approval of both the Commissioner and the Secretary, but to save the time of the latter by permitting the former to disapprove the will, so that no further action by the Secretary would be necessary.

DELEGATION OF ADMINISTRATIVE POWER—INDIAN LANDS—ADVANCE AUTHORIZATIONS FOR THE SALE OF RESTRICTED INDIAN LANDS PLEDGED TO TRIBES AS SECURITY FOR LOANS MADE TO INDIAN CHARTERED CORPORATIONS.

The Secretary of the Interior may delegate to the Commissioner of Indian Affairs authority to approve advance authorizations for the sale of restricted lands pledged to tribes as security for loans made to Indian chartered corporations. While it is true that the execution of the form, which cannot be revoked by the Indian debtor, creates in effect an encumbrance on restricted land, it is in favor of the United States against whom the restrictions do not run and in any event the ultimate approval of the conveyance would constitute necessarily an approval of a prior encumbrance. The delegation could, therefore, be made even if the approval of the conveyance were not delegable.

DELEGATION OF ADMINISTRATIVE POWER—INDIAN LANDS—APPROVAL OF "RECEIPT AND RELEASE AGREEMENTS" SETTLING CLAIMS OF DAMAGE TO ALLOTTED LANDS OF THE FIVE CIVILIZED TRIBES.

The Secretary of the Interior may delegate to the Commissioner of Indian Affairs authority to approve "Receipt and Release Agreements" settling

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claims of damage to allotted lands of the Five Civilized Tribes. Whatever the precise nature of these agreements, they are contracts affecting restricted land which are subject to approval by the Secretary under the terms of the statutes governing the lands of the Five Civilized Tribes. Since the Secretary may delegate authority to remove restrictions, he may obviously also delegate the authority to approve an agreement which may not amount to a transfer of an interest in the restricted lands. No substantial risk of litigation would moreover be involved in such delegation.

DELEGATION OF ADMINISTRATIVE POWER—INDIANS—AUTHORIZATION FOR THE EXPENDITURE OF TRIBAL INDUSTRIAL ASSISTANCE FUNDS FOR TRIBAL ENTERPRISES.

The Secretary of the Interior may delegate to the Commissioner of Indian Affairs authorization for the expenditure of tribal industrial assistance funds for tribal enterprises. Such delegation has in fact already been made under the terms of the amendments to Part 29 of the Credit Regulations approved on July 2, 1943. The delegation may be made because the applicable legislation does not require approval by the Secretary; it required only that the regulations shall be Secretarially prescribed.

DELEGATION OF ADMINISTRATIVE POWER—INDIANS—CONTRACTS PURSUANT TO JOHNSON-O'MALLEY ACT OF APRIL 16, 1934, AS AMENDED (25 U. S. C. SECS. 452-455).

The Secretary of the Interior may delegate to the Commissioner of Indian Affairs authority to make contracts pursuant to the Johnson-O'Malley Act. The fact that the making of the contract involved discretionary elements does not prevent delegation, especially since the Secretary of the Interior is given wide rule-making authority under the statute.

DELEGATION OF ADMINISTRATIVE POWER—INDIAN AFFAIRS—TRAVEL ORDERS.

The Secretary of the Interior may delegate to the Commissioner of Indian Affairs the approval of authorizations for travel which under the existing orders of the Secretary require his approval. The reason for this conclusion is the same as that stated in Solicitor's memorandum M. 33180 of June 14, 1943, which held that such a delegation could be made because the Standardized Government Travel Regulations permitted delegation, and such delegation could be made by the Secretary to the head of a bureau in conformity with the legislation governing the relationship of the Secretary to the bureau.

DELEGATION OF ADMINISTRATIVE POWER—INDIAN AFFAIRS—REQUESTS FOR DELEGATION REQUIRING FURTHER CLARIFICATION.

Because the requests for further delegation are not clear, no final opinion is expressed concerning (1) correspondence involving trespass, grazing privileges, hunting and fishing rights; (2) leases and permits on tribal lands except where tribal constitutions or statutes require departmental approval; (3) approvals and denials of extensions of time within which timber must be removed, and timber sales and contracts for the cutting and delivery of logs on the Menominee Reservation; and (4) claims for enrollment rights in Indian tribes.

GARDNER, *Solicitor*:

This is to advise you [Assistant Secretary] concerning the legal power of the Secretary to delegate certain functions now exercised by you to the Commissioner of Indian Affairs. The consideration of the legality of delegating most of these functions was deferred at the time Order 1721 of August 10, 1942 was signed. Since then other functions have been added to the original request. The principal questions of delegation are to be answered in relation to (a) the sale of Indian allotted and inherited lands, and (b) the determination of heirship and the approval of wills in the probate of Indian estates. A considerable number of other functions are, however, also involved.

1. THE SECRETARY'S GENERAL POWER OF DELEGATION

As I have already had occasion to inform you or the Under Secretary in a number of other memoranda dealing with problems of delegation,¹ the Secretary of the Interior, as the head of one of the departments of the Federal Government, has a wide discretion in ordering its affairs, and in the exercise of this discretion, he may ordinarily delegate those functions that fall within the province of the various bureaus of his Department to the respective heads of such bureaus. While I have already discussed at some length the general considerations applicable to delegations by the Secretary to bureau heads, I think I should take advantage of this occasion to elaborate and clarify my views, especially since the problem presents somewhat greater difficulties in the field of Indian affairs.

The Secretary's power to delegate his functions to the heads of the bureaus has a variety of sources. A general power to delegate functions which by their very nature can be performed by subordinates is conferred by section 161 of the Revised Statutes (now 5 U. S. C. sec. 22) providing that "the head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business * * *." The general power to delegate under this provision has been recognized by the courts.²

¹ Memorandum of October 26, 1942, as supplemented by the memorandum of April 17, 1943, dealing with delegations to the Commissioner of the General Land Office; memorandum of June 14, 1943 (M. 33180), dealing with the delegation to the Director of the Bureau of Mines of authority to approve certain types of travel orders; the memorandum of June 18, 1943 (M. 33184), dealing with the delegation to the Director of the Geological Survey of certain functions relating to over-all management and fiscal administration in the Department; and the memorandum of August 16, 1943, dealing with the delegation of certain functions to the Director of Grazing.

² *Norris v. United States*, 257 U. S. 77, 81; *The John Shillito Co. v. McClung*, 51 Fed. 868, 871 (C. C. A. 6, 1892); *Lew Shee v. Nagle*, 22 F. (2d) 107, 109 (C. C. A. 9, 1927). It is true that the delegations in these cases were to assistant secretaries to whom the Secretaries had specific power to delegate under the statutes creating the offices of the assistants, but the fact that the courts also relied on section 161 of the Revised Statutes demonstrates the importance attributed by them to the general power.

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It has been most recently reaffirmed in *Cudahy Packing Co. v. Holland*, 315 U. S. 357, 366. There the Court refused to permit the administrator of the Fair Labor Standards Act to delegate his subpoena power, partly because the Court regarded it as oppressive and easily susceptible to abuse, and partly because the Court read the legislative history of the act as evidencing an intention on the part of Congress not to permit delegation. Chief Justice Stone, however, implied with reasonable clarity that the result would have been different if Congress, instead of entrusting the powers under the Fair Labor Standards Act to an independent administrator, had "committed the administration of the act to the Secretary of Labor" who would have had authority under section 161.

The nature of the office of the official to whom a power is to be delegated is also important. The broad authorization contained in section 161 of the Revised Statutes is reinforced by the statutory provision of section 441 of the Revised Statutes as amended (now 5 U. S. C. sec. 485) which charges the Secretary of the Interior with "the supervision of public business" relating to a considerable variety of subjects, and the further statutory provisions³ relating to the appointment of the heads of the bureaus, offices and divisions which together make up the Department of the Interior. So far as concerns the administration of Indian affairs, section 463 of the Revised Statutes (now 25 U. S. C. sec. 2) provides that "The Commissioner of Indian Affairs shall, under the direction of the Secretary of the Interior, and agreeably to such regulations as the President may prescribe,⁴ have the management of all Indian affairs and of all matters arising out of Indian relations." These provisions, when read together, establish a departmental rather than a personal framework within which the Secretary discharges his duties. From the general framework of section 161 of the Revised Statutes, authorizing broadly the delegation of the Secretary's duties, and section 463, authorizing with equal breadth the management of all Indian affairs by the Commissioner, arises a very strong presumption that Indian matters committed to the Secretary may be delegated to the Commissioner.⁵

While section 463 of the Revised Statutes refers in express terms to a power in the Secretary of "direction" rather than delegation, the

³ See statutes cited in footnote to 5 U. S. C. sec. 485.

⁴ The regulation of Indian Affairs by the President has become virtually obsolete so that they are now managed by the Commissioner of Indian Affairs under the direction of the Secretary of the Interior.

⁵ See *United States v. Birdsall*, 233 U. S. 223, 232; *United States ex rel. West v. Hitchcock*, 205 U. S. 80, 85, and *Rainbow v. Young*, 161 Fed. 835, 838 (C. C. A. 8, 1908), commenting on the general jurisdiction of the Commissioner of Indian Affairs in Indian matters.

existence of a power of delegation to a bureau head cannot be doubted. It arises from the very relationship between the Secretary and the heads of his bureaus. The head of a department would not have been provided with these assistants unless it had been contemplated that he should take advantage of their services. An examination of title 25 of the United States Code, dealing with Indian matters will show that in the course of Indian legislation there have been relatively few functions which have been directly vested in the Commissioner of Indian Affairs alone⁶ but his participation in Indian administration has nevertheless been large. The heads of the bureaus were originally the key figures in Federal administration,⁷ and their independence in the decentralized Federal administration was such that the extent of the supervision which might be exercised over them by the heads of the departments long remained in doubt.⁸ The heads of the bureaus generally antedated the assistant secretaries, and the head of a department therefore had no choice but to rely upon them in getting done the work of his department.⁹ When provision was later made for assistant secretaries, it was surely not intended that these additional aides should replace the older ones.

It is true that the great majority of statutes governing the functions of the Department of the Interior vest power in the "Secretary of the Interior" rather than in particular Commissioners. But this statutory form of reference does not in itself demonstrate that the Secretary must personally exercise the power. The Attorney General has recognized that "Secretary" and "Department" are usually equivalent expressions (39 Op. Atty. Gen. 541, 542) and they have been employed interchangeably not only in common parlance but in legislative debate. While a reference to "departmental" action obviously implies that it is impersonal, a reference to "Secretarial" action does not in itself necessarily imply that it must be personal. Administrative action, in contrast to judicial action, is normally impersonal. The

⁶ See sections 3, 5, 7, 8, 12, 127, 261, 262, 274, 279, 285, 286, 288, 289, 292, 405.

⁷ See A. W. MacMahon, "Selection and Tenure of Bureau Chiefs in the National Administration of the United States," in *American Political Science Review*, vol. XX (1926), p. 548 *et seq.*, and F. J. Goodnow, *The Principles of the Administrative Law of the United States* (1905), pp. 136-137, 141-143, 375-376.

⁸ The course of centralized control may be traced through such cases as *Elliott v. Swartwout*, 10 Pet. 137; *Butterworth v. Hoe*, 112 U. S. 50; *Merritt v. Cameron*, 137 U. S. 542, and *Knight v. United States Land Association*, 142 U. S. 161. In the *Merritt* case, it was finally settled that the power of supervision by the head of a department extended to the issuance of regulations, and in the *Knight* case, that it might be exercised by "direct orders or by review on appeals."

⁹ So extensive were their duties that in *Parish v. United States*, 100 U. S. 500, 504, the Supreme Court actually implied that a bureau chief was more burdened than the head of a department: "It has been found," said the Court, "in regard to many of these bureaus, and even to the heads of departments, that it is impossible for a single individual to perform in person all the duties imposed on him by his office."

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fact that under some statutes the power is vested in the head of a bureau rather than in the head of the department may have no greater significance than that under such statutes the bureau chief may act without awaiting specific instructions from his superior. But even here the Secretary, if he so desires, by virtue of his general power of direction and supervision, may assume complete control over the discharge of the particular function; so that the situation will become the same as if the power had been directly vested in the Secretary in the first instance.

The legislative choice between Secretary and Commissioner seems in truth to be largely a matter of terminological accident, and it would be misleading to attribute a common and careful discrimination in phraseology to diverse draftsmen and Congresses.¹⁰ For instance, despite the fact that section 463 of the Revised Statutes subjects the Commissioner of Indian Affairs to the direction of the Secretary, Congress has occasionally enacted that a particular power entrusted to the Commissioner of Indian Affairs should be exercised by him "subject to the approval of" or "under the supervision of" the Secretary of the Interior,¹¹ provisions that would seem to be wholly superfluous. Each statute vesting a power in the Secretary or the Commissioner of Indian Affairs must be read against the background of sections 161 and 463 of the Revised Statutes, which constitute the basic framework for each specific allocation of function.

But, apart from all statutes, the power of delegation of a head of a department is a dictate of common sense. While even a general statutory authority to delegate contains a latent qualification that it is not to be pressed to the point of abdication of major duties, particularly when they involve the formulation of basic policies, the great bulk of the routine or trivial tasks which are committed to a department head must and can be delegated.¹² To hold otherwise would prevent the Secretary from exercising that general supervision over the basic policies of a department with which he is expressly charged by statute, and which inheres in the very nature of his office.

¹⁰ Cf. *United States v. Stewart*, 311 U. S. 60, 69, *Scripps-Howard Radio v. F. C. C.*, 316 U. S. 4, 11.

¹¹ See title 25 of the United States Code, secs. 10, 13, 66, 99, 222, 264, 292, 295, 302 and 384.

¹² This is the implication of such cases as *Crane v. Nichols*, 1 F. (2d) 33 (D. C. S. D. Tex.), and *Alword v. United States*, 95 U. S. 356, 358, where the Court said: "We suppose that the assistant postmasters general were appointed for precisely such functions as this one discharged in the matter, and it would be a dangerous principle to hold that the Department is bound alone by what is transacted by the Postmaster General in person; for the same rule would free parties dealing with the department from obligations not assumed directly with its head." While the act of June 8, 1872 (17 Stat. 284, Rev. Stat. sec. 389, 5 U. S. C. sec. 363), provided for three assistant postmasters general, the Postmaster General was not given express power to delegate his duties to them.

He would cease to be a policy maker and become a drudge. There is an ultimate source of delegation that is not written down in so many words in any single statute, but is to be derived from the cumulative effect of all of them. If only a few functions were entrusted to the head of a department, it could reasonably be argued that he should personally discharge all of them. When Congress has heaped more and more statutory duties upon a high executive officer, it must follow, in the absence of the clearest and strongest evidence of a contrary intention, that he may perform them through delegates.

This principle of delegation is perhaps most clearly exemplified in the Presidential office. It was no doubt intended in the early days of the Republic that the President should play a more important personal role in the conduct of national affairs than is the case today, and this was particularly true in the case of Indian affairs, which were regarded as a type of foreign affairs. In title 25 of the United States Code are to be found a very large number of Indian powers entrusted to the President rather than the Secretary of the Interior or the Commissioner of Indian Affairs.¹³ Today, these powers, whatever their form, in so far as they are not obsolete, could undoubtedly be exercised by the President through the Secretary of the Interior. In view of the first rank of the Presidential office and the enormous burdens that have been put upon the President in the course of the decades, the courts have come to permit him to act through the members of his cabinet by creating the virtually irrebutable presumption that their acts are deemed to be the acts of the President. *Wilcox v. Jackson*, 13 Pet. 498; *Williams v. United States*, 1 How. 290, 297; *Confiscation Cases*, 20 Wall. 92, 109; *Wolsey v. Chapman*, 101 U. S. 755, 769; *Chicago, Milwaukee and St. Paul Ry. Co. v. United States*, 244 U. S. 351, 357; *French v. Weeks*, 259 U. S. 326, 334. It has also been held that the President may act through the Commissioner of Indian Affairs. *Belt's Executrix v. United States*, 15 Ct. Cls. 92; *United States v. Olapow*, 35 Fed. 575 (D. C. D. Oreg.). And the acts of not only secretaries but assistant secretaries and the heads of bureaus are protected from attack by the presumption that their actions have been taken within the scope of their authority. *McCollum v. United States*, 17 Ct. Cls. 101; *Chadwick v. United States*, 3 Fed. 750 (C. C. D. Mass.); *United States v. Adams*, 24 Fed. 348 (C. C. D. Oreg.). Surely it is reasonable to suppose that, if the President may act through the heads of the departments, the latter may in turn act through the heads of the bureaus.

¹³ See secs. 111, 112, 113, 115, 139, 140, 141, 153, 157, 174, 180, 196, 220, 223, 225, 229, 263, 271, 331, 348.

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There are many judicial decisions holding that, while an executive officer may delegate purely ministerial duties, he must personally discharge duties involving the exercise of judgment or discretion. These cases usually involve, however, inferior officers, such as those of municipal corporations.¹⁴ To hold that the head of a department cannot delegate duties involving the exercise of judgment or discretion would be to nullify section 161 of the Revised Statutes. The Attorneys General have pointed out the futility of applying to a high executive officer, such as the head of one of the great departments of the Government "any principle based upon the theory that every duty imposed upon, or power vested in the Secretary, which requires the exercise of judgment or discretion, must be performed by him personally * * *." 35 Op. Atty. Gen. 15, 19; see also 37 Op. Atty. Gen. 364; 39 Op. Atty. Gen. 541, 543. The last-cited opinion contains a particularly illuminating discussion of the bases of delegation by the heads of the departments. It points out not only that "regarding the nature of the offices, the assumption is required that the assignments will include duties of a high character" but that whatever the duty of the head of a department in the initial phase of the administration of a statute, once precedents have become established, delegation amounts only to "an assignment of the detail of disposing of particular applications according to precedents already established, subject to any exceptions which the Secretary may now find proper or hereafter may become advisable." (39 Op. Atty. Gen. 541, 546.)

"Delegation," as Mr. Justice Douglas pointed out in his dissenting opinion in the *Cudahy Packing* case, 315 U. S. 357, 369, "is a matter of degree." It rarely occurs in a form that amounts to a complete abdication of function. An official duty of decision may no less effectively be discharged through the issuance of general rules and regulations. *Ferguson v. Port Huron and Sarnia Ferry Co.*, 13 F. (2d) 489, 492 (D. C. E. D. Mich.). Moreover, the regulation governing the exercise of a power by a subordinate need not necessarily be in writing but may consist of the unwritten usage of a department. *United States v. Birdsall*, 233 U. S. 223, 231. The theory of legislative delegation should also be applicable to administrative delegation. The courts have said that, while no delegation of legislative power to administrative agencies or officials is permissible, Congress may nevertheless permit them to issue rules and regulations to implement the policy which it has itself laid down. The administrative

¹⁴ Mechem, *Public Offices and Officers*, Sec. 566 *et seq.*; Throop, *Public Officers*, ch. XXIV.

official is then merely "filling in the details," and no delegation has in fact taken place. So, too, there is no forbidden delegation when the subordinate is merely executing the rules and regulations promulgated by his superior. This is preeminently true when the superior has provided for a right of appeal to him from the decision of his subordinate. Indeed, in the case of the Secretary of the Interior, his duty of direction and supervision over the Commissioner of Indian Affairs, would necessarily imply a duty of considering appeals from decisions of the latter in exercising powers specifically entrusted to his subordinate by statute.¹⁵

Finally, it is to be noted that even when a high executive officer must "approve" an action, it does not necessarily follow that he must approve in writing or by signing his name. His approval may not only be given under general instructions but it may be gathered from circumstances.¹⁶ As the Supreme Court said in *Hannibal Bridge Co. v. United States*, 221 U. S. 194, 206: "It is physically impossible for the head of an executive department to sign, himself, every official communication that emanates from his Department." Certainly when he has in fact approved, he may have someone else stamp or sign his signature as a token of his approval. 31 Op. Atty. Gen. 146, 349.

2. SPECIFIC PROBLEMS

(a) *The sale of allotted lands and inherited interests in allotted lands.* The general powers of the Secretary over the sale of allotted lands and inherited interests in allotted lands, whether held in trust or otherwise restricted against alienation, are based upon a considerable number of statutes.¹⁷ He also possesses similar powers under

¹⁵ In *Butterworth v. Hoe*, 112 U. S. 50, 57, the Supreme Court of the United States held with reference to the Commissioner of Patents that in all cases affecting private rights as distinguished from those in which the public has a general interest, the "official duty of direction and supervision on the part of the Secretary implies a correlative right of appeal from the Commissioner, in every case of complaint, although no such appeal is expressly given."

¹⁶ Compare *Northern Pacific Ry. Co. v. Wismer*, 246 U. S. 283, which upheld the establishment of an Indian Reservation by the Commissioner of Indian Affairs with only the tacit approval of the Secretary of the Interior. In *Loma v. Pickering*, 173 U. S. 26, 30, it was held that the President's approval of a deed could be expressed in any form or on any document.

¹⁷ The course of legislation in this field was as follows: Acts of May 27, 1902, section 7 (32 Stat. 245, 275, 25 U. S. C. sec. 379); May 8, 1906 (34 Stat. 182, 183, 25 U. S. C. sec. 349); June 21, 1906 (34 Stat. 325, 327, 25 U. S. C. sec. 409); March 1, 1907 (34 Stat. 1015, 1018, 25 U. S. C. sec. 405); May 29, 1908, section 1 (35 Stat. 444, 25 U. S. C. sec. 404); June 25, 1910, sections 1 and 2 (36 Stat. 855), as amended February 14, 1913 (37 Stat. 678, 25 U. S. C. sections 372 and 373). The provisions of the act of May 8, 1906, as to sales, and the provisions of the act of May 29, 1908, were practically superseded by the act of June 25, 1910, which is now the basic statute. Indeed this act was only a reenactment of the acts of May 8, 1906, and May 29, 1908 (H. Rept. 1135, April 26, 1910).

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statutes governing the Five Civilized Tribes,¹⁸ and other Indian Tribes in Oklahoma.¹⁹ The Secretary may in effect remove restrictions from Indian lands by issuing a patent in fee, or a certificate of competency upon the application of the Indian owner. Restricted lands may also be sold "subject to the approval" of the Secretary or "under rules and regulations" prescribed by him. Restrictions on the alienation of lands may be removed either conditionally or unconditionally. The present regulations governing the alienation of restricted Indian lands are to be found in title 25, part 241, of the Code of Federal Regulations. Section 4 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 985, 25 U. S. C. sec. 464), has however, greatly limited the extent of the Secretary's powers over the alienation of Indian lands, and the sale of such lands is now relatively infrequent.²⁰ While on all reservations patents in fee and certificates of competency may still be issued,²¹ the power of the Secretary to permit alienation depends upon whether a reservation is under the Indian Reorganization Act. On reservations under the act sales are limited to the Indian tribe. However, even on reservations not under the act, the policy is to restrict sales.²² The regulations provide, however, that sales of heirship lands may be made without the consent of the interested heirs. In view of the general considerations noted in the preceding pages, the power of the Secretary of the Interior to make delegations of authority in this field to the Commissioner of Indian Affairs would be entirely clear but for the fact that the removal of restrictions

¹⁸ The Secretary was first empowered to remove restrictions on alienation on lands of the Five Civilized Tribes by the act of April 21, 1904 (33 Stat. 189, 204). By section 22 of the act of April 26, 1906 (34 Stat. 137, 145), conveyances by full-blood heirs were made subject to the approval of the Secretary of the Interior but by section 9 of the act of May 27, 1908 (35 Stat. 312, 315), the Oklahoma courts having jurisdiction of the estate of the deceased allottee were substituted for the Secretary. But under section 1 of the act of May 27, 1908, as amended by section 1 of the act of May 10, 1928 (45 Stat. 495), the Secretary has authority to remove restrictions on allotted lands.

¹⁹ *As to Osage*: Act of June 28, 1906 (34 Stat. 539, 544), section 2, subdivision 4, and section 12; April 18, 1912 (37 Stat. 86, 87, 88), sections 3, 6 and 8; May 25, 1918 (40 Stat. 561, 579); March 3, 1921 (41 Stat. 1249), section 3; February 27, 1925 (43 Stat. 1008, 1010), section 3. *As to other Oklahoma Tribes*: Acts of August 15, 1894 (28 Stat. 295, 296), June 10, 1896 (29 Stat. 321, 343), June 7, 1897 (30 Stat. 62, 72), May 31, 1900 (31 Stat. 221, 247), section 7; March 3, 1909 (35 Stat. 751, 752), March 3, 1909 (35 Stat. 778).

²⁰ Even prior to the enactment of the Indian Reorganization Act the Secretary had approved Order No. 420 on August 14, 1933, which provided that until further notice "no more trust or restricted Indian lands, allotted or inherited, shall be offered for sale, nor certificates of competency, patents in fee, or removal of restrictions be submitted to the Indian Office for approval, except in individual cases of great distress or other emergency where it appears absolutely necessary that a restricted Indian tract of land be offered for sale for relief purposes."

²¹ Memorandum, Solicitor, Interior Department, August 14, 1934.

²² 25 CFR 241.9 to 12.

or the alienation of restricted land is a matter of more than routine importance, and the further fact that most of the general acts of Congress on this subject expressly refer decisions on the alienation of restricted land or on the removal of restrictions to the discretion or approval of the Secretary of the Interior while referring other less basic responsibilities, affecting, for example, funds or reports, to the Commissioner of Indian Affairs. As indicated below, however, I do not believe these considerations to be controlling.

I find no evidence in the legislative history of the relevant statutes that compels the conclusion that Congress intends that the Secretary's powers over the sale of original and inherited allotments shall be exercised personally. I think that for the purposes of the problem of delegation the administration of Indian property should be considered as a single activity dominated by common conceptions of policy in particular phases of its history. It should require therefore the strongest evidence to show that disposition of Indian property under a particular statute demands the personal action of the Secretary when dispositions under other statutes involving similar property interests of no less importance do not demand such personal action. So far as concerns the problem of delegation there is no more reason to distinguish between lands of the Five Civilized Tribes (or other Indian Tribes in Oklahoma) and Indian lands elsewhere than there is to distinguish between original allotments and inherited interests in such allotments.

The Congressional debates and reports with reference to the relevant statutes variously refer to "Secretary," "Commissioner," "Department" or "Indian Department" as discharging a particular function, or different functions. But to dwell upon the accident of whether a Congressman on the floor happened to say "Secretary" rather than "Department" is to substitute verbal quibbling for reasonable construction. Even if the distinction between "Secretary" and "Department" had any significance, the reference in the debates to "Department" is at least as frequent as those to "Secretary." The debates show a full awareness on the part of Congress that the real decisions as to the alienation of Indian property were made in the Indian Office, and that they were departmental rather than personal. The size of the appropriations made to carry on the work of the Indian Office is explicable only upon the assumption that the alienation of Indian property was actually being accomplished there rather than in the Office of the Secretary. That the thought of at least many members of Congress was Department-wise is shown best when the debate revolved around the question whether the alienation of Indian lands should be entrusted to the courts rather than the De-

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partment of the Interior. On such occasions the personal character of judicial action was emphasized.²³ References to the "discretion" of the Secretary are particularly meaningless in connection with Five Tribes lands because the debates in Congress as to the power of removing restrictions always revolved about the question whether the power should be entrusted to the Oklahoma courts rather than to the Department and the Secretary.²⁴

I also find nothing in the texts of the statutes themselves that convinces me that delegation is not permissible. The first general statute, the act of May 27, 1902, providing only for the sale of heirship lands, made conveyances "subject to the approval of the Secretary of the Interior," and the first statute providing for removal of restrictions on lands of the Five Civilized Tribes also provided that it should be done "with the approval of the Secretary of the Interior" and "under such rules and regulations as the Secretary of the Interior may prescribe * * * and the approval of the Secretary of the Interior shall be in writing * * *." The requirement of approval must be deemed to be equivalent to the provision that the action to be taken should be left to the Secretary's discretion—a form of provision that does not in itself prevent delegation. Moreover, the departmental character of the supervision of the act of alienation is emphasized in all the subsequent statutes by the provision that it shall be performed under such terms and conditions and under such rules and regulations as the Secretary may prescribe—an obvious aid to delegation since it enables the Secretary to secure the discharge of the function under general rules and regulations. While the acts of May 8, 1906, and May 29, 1908, in some circumstances require the Secretary to be satisfied of the competency of the Indian, they also merely provide that he shall "cause to be issued a patent in fee simple." The same sort of language is even more marked in the basic act of June 25, 1910. While it is provided therein that if the Secretary finds the heirs to be competent, "he shall issue to such heir or heirs a patent in fee," it is also provided that if he finds one or more of the heirs to be incompetent, "he may, in his discretion, cause such lands to be sold," and that if he decides to partition the lands "he may cause the shares

²³ See particularly 41 Cong. Rec., pt. III, pp. 2284, 2285, containing the remarks of Senator Clapp urging that a court would be a better agency than the Department to remove restrictions on alienation. Speaking a few days later, Senator Clapp said: "Last year we passed a general law giving the Interior Department authority to remove restrictions * * *." (41 Cong. Rec., pt. III, p. 2415.)

²⁴ In House Report No. 637, 67th Cong., 2d sess., dated January 31, 1922, the House was informed that while the duties of guardianship of the Five Civilized Tribes "are devolved by law upon the Department of the Interior," they were "very largely performed through the Superintendent of the Five Tribes."

of such as are competent, upon their petition, to be set aside and patents in fee to be issued to them therefor." The very omission of the word "cause" from the first clause relating to the issuance of patent in fee to competent heirs is, however, an instructive reminder of the futility of attempting to resolve problems of delegation as the basis of slight variations in language.

The acts of March 1, 1907, and May 29, 1908, did make a distinction between Secretary and Commissioner. Alienations of allotments or inherited interests were made subject to such terms and conditions and such rules or regulations as the Secretary might prescribe but it was also provided that the proceeds of any disposition should be used for the benefit of the allottee or his heirs "under the supervision of the Commissioner of Indian Affairs." But I think that Congress was here merely expressing the normal expectation that the purely managerial function of handling the proceeds would be discharged by the Bureau of Indian Affairs. This would have been the practice even in the absence of such an express provision. It would be misleading to imply a presumption against delegation of a function entrusted to the Secretary merely because another has been entrusted to the Commissioner, especially since the separate allocation of each of the functions does not prevent the Secretary from exercising both, and its only practical effect is to enable the Commissioner to act without awaiting instructions from the Secretary. It should be particularly noted that both the acts of March 1, 1907, and May 29, 1908, are couched in terms that do not require personal action on the part of the Secretary. While both acts refer indirectly to a requirement of approval on his part, they both also provide for sale under such terms and conditions and under such rules and regulations as he may prescribe, and the 1908 act, moreover, provides only, with reference to inherited interests, that he "shall cause to be issued * * * a patent in fee simple," and that "upon the approval of any sale * * * he shall cause a patent in fee to issue." In any event the provision in these acts for the administration of the proceeds by the Commissioner of Indian Affairs is not to be found in the final act of June 25, 1910, which, moreover, contains a general provision, as follows: "All sales of lands allotted to Indians authorized by *any* other Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe * * *." Neither the text nor the legislative history of the Indian Reorganization Act indicates any intention to disturb the legislative *status quo* with respect to the power of delegating

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the function of accomplishing the alienation of Indian allotments.²⁵

There is little authority on questions of delegation in the field of Indian affairs but there are a number of *dicta* with reference to conveyances of Indian lands. In *Gentry v. McCurry*, 164 Okla. 1, 22 P. (2d) 75, the court upheld the power of the Secretary to make use of the Oklahoma county court in conducting a sale of an Indian minor's land. However, since the deed in this case was also approved by the Secretary as the ultimate holder of the power of sale, no true problem of delegation was really involved. Nevertheless, the common sense statement of the court is worth noting. "Congress," said the court, "recognized that the Secretary of the Interior could not go personally to Pawhuska, Oklahoma, and conduct the sale of the lands belonging to the allottees, and for that reason gave him the right to provide the method of sale of the lands * * *." There are, however, *dicta* unfavorable to delegation of the Secretary's powers over restricted property in *United States v. Watashe*, 102 F. (2d) 428 (C. C. A. 10, 1939), and in an opinion of a Solicitor of this Department, M. 25258, dated June 26, 1929. The *Watashe* case involved the validity of a deed of Creek Indian land which had been approved not by the Secretary of the Interior but by the Assistant Superintendent of the Five Civilized Tribes, although the governing act was that of April 21, 1904, which not only required the Secretary's approval but prescribed that it should be given in writing; the Solicitor's opinion of June 26, 1929, involved the question whether the Secretary could without statutory authority create a trust of restricted Indian funds which might be administered by a commercial trust company. The court was thinking of the dangers of delegating to subordinate officials such as Indian superintendents, and was particularly impressed by the fact that section 5 of the act of May 11, 1938 (52 Stat. 347, 348, 25 U. S. C. sec. 396e), expressly authorized the Secretary to authorize "superintendents or other officials in the Indian Service" to approve Indian mining leases. On the other hand, the Solicitor was thinking of the dangers of

²⁵ A power of delegation was expressly included in Title 1, section 13(a), of H. R. 7902, but this provision was omitted from S. 3645, the bill which actually became the Indian Reorganization Act. In any event I should be unable to perceive the logic of erecting an unsuccessful attempt at statutory delegation as a bar to all delegation in the future, and the same is even true of successful attempts. Legislation intended to remove doubts would thus end by creating them. For instance, the act of September 21, 1922 (42 Stat. 994, 995, 25 U. S. C. sec. 392), expressly authorized the Secretary of the Interior to permit the alienation of allotments which under any law or treaty could be alienated only with the consent of the President. But at least in this particular instance the legislative history establishes conclusively that the purpose of the statute was merely to allay the traditional anxiety of conveyancers. See H. Rept. 623 (January 27, 1922); H. Rept. 637 (January 31, 1922); and S. Rept. 551 (March 9, 1922), all in 67th Cong., 2d sess.

turning restricted funds over to a private trust company which might become involved in State as well as in Federal litigation. In neither case is it clear that there would have been disapproval of delegation to the Commissioner of Indian Affairs, who was neither a subordinate official nor acting in a private capacity but the official specifically charged with the general administration of Indian affairs.

It may well be argued that in the field of Indian affairs greater caution should prevail in delegating Secretarial powers than in such fields as the public lands. The Indian in contemplation of law is not *sui juris*; and, since he is a ward, his rights should be protected with special care. The argument would seem to prove too much, as a legal proposition, for it would prevent almost any delegation in the field of Indian affairs. Yet it is a consideration which must be weighed with great care in making the policy decision. So far as concerns the bare legal power to delegate, I believe it would have force only if the Secretary were to propose to delegate his powers over Indian property to Indian superintendents, or other Indian Service employees, or local courts. It has, however, very little force if the delegate is to be the Commissioner of Indian Affairs who in reality already exercises much of the substance of the powers which are proposed to be delegated under rules and regulations, and is now subject only to the most general supervision of the Secretary.

As a matter of fact, the Secretary has already under the regulations delegated to the Commissioner of Indian Affairs his power to disapprove alienations of Indian lands. I am of the opinion that he may now further delegate to him the power to approve such alienations subject to existing rules and regulations, and the decisions and practices of the Department. I have hitherto expressed the opinion that delegations should also be made subject to appeal to the Secretary, but it would be meaningless to give a right of appeal on the merits to either the Indian who wishes to dispose of his land, or the prospective purchaser from the decision of the Commissioner issuing a patent in fee or approving a sale, since the application is never made unless seller and purchaser are anxious or willing to consummate the transaction.

Litigation can arise only from changes of circumstances in the future, which are usually unforeseeable. The Indian owner may seek to avoid the transfer if for some reason the land should become very valuable, or a subsequent purchaser may refuse to take title if the land should suddenly decline in value, or if he should himself become financially embarrassed. It is true that, if a title were

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attacked because it had been conveyed without proper approval, it could be validated by Secretarial approval given at such time even though decades had elapsed since the original transfer and the original allottee had died,²⁶ but the propriety of giving such approval would be entirely in the discretion of the subsequent Secretary.

The situation then is one in which one of the factors ordinarily making delegation of power plainly permissible is absent. More importantly, it involves the title to real property and I should doubt that the traditional caution of property lawyers will be matched by a corresponding learning in the law of Federal delegation. The issue may arise in litigation at any time and may be resolved in State courts by litigants who may not choose to carry the Federal question to the Supreme Court of the United States. In these circumstances I think that you should, if you decide to delegate this function, obtain also the opinion of the Attorney General.

(b) *The determination of heirship and the approval of wills.* The present law and practice with respect to the general determination of heirship and the approval of wills rests upon sections 1 and 2 of the act of June 25, 1910 (36 Stat. 855, 856, 25 U. S. C. secs. 372 and 373). The probate of the estates of Indians of the Five Civilized Tribes and the Osage Indians is confided by Federal statutes to the Oklahoma courts²⁷ except that under the act of December 24, 1942 (56 Stat. 1080), exclusive jurisdiction is conferred upon the Secretary of the Interior "under such rules and regulations as he may prescribe" to determine the heirs and probate the estates of restricted Indians of the Five Civilized Tribes which consist only of funds or securities of an aggregate value not exceeding \$2,500.

As originally enacted, section 2 of the act of June 25, 1910, which gave allottees the right to dispose of their holdings by will, "in accordance with rules and regulations to be prescribed by the Secretary of the Interior," also contained the proviso that "no will so executed shall be valid or have any force or effect unless and until it shall have been approved by the Commissioner of Indian Affairs and the Sec-

²⁶ See *Pickering v. Lomax*, 145 U. S. 310, 314, 316; *Lomax v. Pickering*, 173 U. S. 28, 27, 32; *Lykins v. McGrath*, 184 U. S. 169, 171-172; *Anchor Oil Co. v. Gray*, 256 U. S. 519, 522.

²⁷ With respect to the Five Civilized Tribes, see sections 6 and 9 of the act of May 27, 1908 (35 Stat. 312, 313, 315), and section 1 of the act of June 14, 1918 (40 Stat. 606, 25 U. S. C. sec. 375), and with respect to the Osage, see section 3 of the act of April 18, 1912 (37 Stat. 86).

retary of the Interior."²⁸ Speaking of this proviso, Congressman Burke said: "I put both in to safeguard it."²⁹

Whatever may have been the occasion for this provision, the requirement of dual approval was repealed by the act of February 14, 1913.³⁰ The legislative history of the act of 1913 furnishes not the slightest clue to the reason for this change, but it is only reasonable to assume that it was deliberate, and that the question of delegation is now to be determined in accordance with normal criteria.

I am of the opinion therefore that the Secretary's power in approving wills, as well as in determining heirship, can be delegated. While the Indian Reorganization Act obviously reduces the responsibility of the Secretary in the approval of wills³¹ the total number of successions handled by him has not necessarily decreased. In so far as the discretion of the Secretary in approving wills is still important, the Secretary has by general regulation prescribed what factors shall be taken into consideration (Title 25, part 81, sec. 53). The procedure for determining heirs is minutely regulated by the same regulations, and, while this function is quasi-judicial, requiring findings as to heirship in accordance with the evidence, it certainly has little or no discretionary aspect, which is a strong circumstance favoring delegation. Section 52 of the regulations itself refers to the approval of wills as a function of the "Department."

I can find nothing in the legislative history of the act of December 24, 1942, which indicates that the function of administering the small estates with which it deals was to be anything but departmental. It is unlikely that Congress expected the Secretary to pass personally upon the probate of every one of these small estates. The present regulations governing the determination of heirs and approval of wills already provide for summary distribution by the Superintendent of personal estates which do not exceed \$250 in value. (Title 25, part 81, sec. 23.) If the Secretary may permit the Superintendent to distribute \$250 estates, surely he may permit the Commissioner of

²⁸ Similar provisions are to be found in Title 25, section 82, relating to the review of payments under Indian contracts; section 84, relating to the approval of assignments of Indian contracts; and section 383, relating to the approval of plans for irrigation projects.

²⁹ See 45 Cong. Rec., pt. VI, p. 5812, May 4, 1910. If one were to assume a careful analysis, the motive may have been not so much to secure the personal approval of both the Commissioner and the Secretary, but to save the time of the latter by permitting the former to disapprove the will, so that no further action by the Secretary would be necessary. In form the Secretary would thus be given a power of approval. Actually he would be given a power of disapproval.

³⁰ The object of the amendatory act was simply to widen the scope of the 1910 act, so that it would apply to restricted fees, as well as trust patented lands.

³¹ Under section 4 of the act (25 U. S. C. sec. 464), restricted Indian lands and shares in the assets of a tribal corporation can be devised only to the testator's heirs, to members of the tribe, or to the tribe itself.

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Indian Affairs to distribute \$2,500 estates. Elaborate regulations for the distribution of estates under the act of December 24, 1942, were approved on August 9, 1943 (8 F.R. 11335).

I think that the Secretary may delegate to the Commissioner of Indian Affairs power to determine heirs and approve wills under applicable regulations. However, to remove any doubt the delegation should be made subject to a right of appeal to the Secretary. A provision for appeal is entirely practical in the handling of probate matters and interested parties who choose not to take advantage of it will be deemed to have waived any right to object. The general regulations in force at present will only need to be modified to provide that the Examiner of Inheritance shall notify all parties at the hearing that they have a right to appeal to the Secretary from any adverse determination by the Commissioner of Indian Affairs.³²

(c) *Authorizations for the sale of restricted Indian lands pledged to tribes as security for loans made by Indian chartered corporations.* This presumably refers to the form entitled "Authority to Sell Restricted Lands" which is executed by an Indian who wishes to borrow funds from an Indian chartered corporation. It authorizes the Secretary upon the Indian's failure to comply with the loan agreement to convey to the corporation the restricted land pledged as security. It is the present practice for this document to be submitted to the Secretary of the Interior for his approval. Since the Commissioner of Indian Affairs requests the delegation to him of the power to sell restricted lands, it may be his intention to request not only the authority to approve the form when the loan is made but also the authority to sell the land upon default in payment of the loan. I have already indicated that the Secretary may delegate to the Commissioner the power to sell restricted land. However, even if this power were to be denied, there still would be no compelling necessity for submitting the conditional authorization to the Secretary for approval. Since the Indian debtor cannot withdraw from the agreement,³³ which is revocable only with the consent of the Secretary of the Interior, there is nothing to prevent the latter from acting upon it upon his default, nor will the death of the debtor prevent the fore-

³² I should also point out that the courts have held that the Secretary may reopen heirship determinations so long as the property remains subject to departmental administration, and that his decisions are not open to collateral attack. *Lane v. United States*, 241 U. S. 201; *Dixon v. Cox*, 268 Fed. 285 (C. C. A. 8, 1920); app. dism. 258 U. S. 634; *Peoria Tribe v. Wea Townsite Co.*, 117 F. (2d) 940 (C. C. A. 10, 1941). Thus even after the time for appeal has passed, the heirship determination remains subject at least to potential supervision by the Secretary.

³³ *Atmeda Oil Co. v. Kelley*, 35 Okla. 525, 130 Pac. 931; *Central National Bank of Tulsa, Okla. v. United States*, 283 Fed. 368, 373 (C. C. A. 8, 1922).

closure of the pledge.³⁴ While it is true that the execution of the form creates in effect an encumbrance on the restricted land, it is in favor of the United States against whom the restrictions do not run, and in any event the ultimate approval of the conveyance would constitute necessarily an approval of the prior encumbrance. The present practice of having the Secretary approve the form may therefore be discontinued without detriment to the legal strength of the transaction. The form should in this event be modified, however, by deleting the signature space now provided for Secretarial approval.

(d) *Approval of "Receipt and Release Agreements" settling claims of damage to allotted lands of the Five Civilized Tribes.* These agreements in similar terms acknowledge the receipt of certain payments in settlement of damages to allotted lands caused by oil companies in permitting "oil, base sediment, salt water and other deleterious substances to escape from * * * wells located in the watershed of the above-described lands and to flow upon, over, across and through said allotment * * * in full satisfaction of damages caused to said land by such pollution * * * for a period of ten (10) years from the date of this receipt." I do not think that I need decide, with reference to the problem of delegation, the rather puzzling question of the precise juristic nature of this form of agreement.³⁵ Whatever its nature, it is a contract affecting restricted land which is subject to approval by the Secretary under the terms of the statutes governing the lands of the Five Civilized Tribes.³⁶ Since the Secretary may delegate authority to remove restrictions, he may obviously also delegate the authority to approve an agreement which may not amount to a transfer of an interest in the restricted lands. There would in any event be no substantial risk of litigation involved in the approval of Receipt and Release Agreements by the Commissioner of Indian Affairs and the power may therefore be delegated without any qualification based upon practicality.

(e) *Authorization for the expenditure of tribal industrial assistance funds for tribal enterprises.* I have already approved the dele-

³⁴ See cases cited in footnote 26, and *Scioto Oil Co. v. O'Hern*, 67 Okla. 106, 169 Pac. 483.

³⁵ In *United States v. Fawcett*, 115 F. (2d) 389 (C. C. A. 10th), the court held that the judgment in this action which was for damages for permanent injury to restricted allotted land by pollution would create or recognize "the existence of a right somewhat difficult to define with precision but which is measurably akin to that of an easement." (p. 392.) Subsequent to this decision, this Department seems to have held in a letter dated June 13, 1941, from the Assistant Commissioner of Indian Affairs to the Superintendent of the Five Civilized Tribes, approved by the Assistant Secretary on June 16, 1941, that the Receipt and Release Agreement form did not involve an interest in the nature of an easement, since the agreement was one for future damages based upon an act of pollution that had already occurred.

³⁶ Compare *Parker v. Richard*, 250 U. S. 235, and *United States v. Hinkle*, 261 Fed. 518 (C. C. A. 8, 1919).

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gation of this function in passing upon amendments to Part 29 of the Credit Regulations relating to "Loans to Indians from Industry Among Indians and Tribal Funds" which authorized the Commissioner of Indian Affairs to approve requests for the use of tribal funds in tribal enterprises. The amendments were approved by the Assistant Secretary on July 2, 1943. There can be no question that the power to make loans for tribal enterprises can be delegated since the Interior Department Appropriation Acts authorize the use of tribal funds in tribal enterprises "when proposed by Indian tribes and approved under regulations prescribed by the Secretary of the Interior." The appropriation acts in terms thus do not require the approval to be given by the Secretary; they require only that the regulations shall be Secretarially prescribed. The Comptroller General has indeed already upheld the power of the Secretary to delegate to the Commissioner the power to make loans to Indians under the act of June 26, 1936 (49 Stat. 1967). 17 Comp. Gen. 773.

(f) *Contracts pursuant to the Johnson-O'Malley Act of April 16, 1934, as amended by the act of June 4, 1936 (48 Stat. 596, 49 Stat. 1458, 25 U. S. C. secs. 452 to 455).* Section 1 of the act authorizes the Secretary of the Interior "in his discretion" to enter into contracts with State political agencies or State educational institutions for education, medical attention, relief and social welfare of Indians. Section 3 of the act authorizes the Secretary of the Interior "to perform any and all acts and to make such rules and regulations * * * as may be necessary and proper for the purpose of carrying the provisions of this Act into effect." I am of the opinion that the powers under the act are clearly delegable. The fact that they are discretionary does not prevent delegation, especially when the officer to whom the powers are granted is given such wide rule-making authority. There is no indication in the legislative history of the act that the powers of the Secretary were not to be delegated.³⁷

(g) *Travel Orders except for the Commissioner and Assistant Commissioner.* I presume that this request relates to authorizations for travel which under the existing orders of the Secretary require his approval, namely (a) travel by air³⁸ or extra-fare trains³⁹ where

³⁷ In discussing the act on the floor of the Senate, Senator Thomas stated that it authorized contracts "by the Bureau of Indian Affairs, acting through the Secretary of the Interior." 80 Cong. Rec., pt. VI, p. 6032, 74th Cong., 2d sess. (April 24, 1936). This merely described the existing practice but there is nothing to show that it was to be unalterable.

³⁸ Secretary's Order No. 1551 of March 20, 1941.

³⁹ The authority to approve travel by extra-fare trains is now vested in the Under Secretary under his general authority to engage in departmental administration. See Secretary's Order No. 1795, dated March 11, 1943.

the cost is in excess of the cost of other available transportation and there is no emergency involving life or property, (b) the issuance of certificates of priority for air travel,⁴⁰ (c) the issuance of general travel orders covering travel throughout the United States, Territories and Island Possessions, or other general travel beyond a district or limited region.⁴¹ I am of the opinion, for the reasons stated in my memorandum to the Under Secretary of June 14, 1943 (M. 33180), holding that the Secretary could delegate to the Director of the Bureau of Mines the authority to issue all travel orders, that the same delegation may be made to the Commissioner of Indian Affairs.

3. REQUESTS FOR DELEGATION REQUIRING FURTHER CLARIFICATION

There are four additional requests for delegation that need clarification. As to two of them, I can express partial or tentative opinions; as to the other two, I think that I should express no opinion until additional information has been supplied.

(a) *Correspondence involving trespass, grazing privileges, hunting and fishing rights.* I presume that such correspondence would merely involve policy matters, and that the Commissioner is not requesting authority to make final determinations which now require Secretarial approval. The conduct of such correspondence can undoubtedly be delegated. As a matter of fact, there are no longer submitted for Secretarial signature certain types of correspondence with United States Attorneys relating to attempts to enjoin or evict trespassers on lands, buildings, or projects, under the control of the Indian Office, including restricted lands, or to recover trespass damages of less than \$1,000. See Assistant Secretary's memorandum of December 28, 1942, and Indian Office Law Circular 3490 of January 11, 1943. However, if the intention is to request authority to make final determinations, the precise nature of such determinations should be specified, and submitted for a further opinion.

(b) *Leases and permits on tribal lands except where tribal constitutions or statutes require departmental approval.* I am not entirely clear whether the exceptions to this request apply to both the leases and the permits. So far as leases are concerned, no valid lease can be made or approved unless there is specific statutory authority therefor, and all the statutes provide for some form of departmental approval. The request indeed seems to assume that the power of the Secretary to approve leases cannot be delegated. Possibly the request refers to the revocable permits sometimes issued by Indian tribes with

⁴⁰ Secretary's Order No. 1645 of February 5, 1942.

⁴¹ Secretary's Order No. 1314 of September 10, 1938, as interpreted by First Assistant Secretary Burlew's memorandum of October 28, 1938.

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departmental approval in the absence of statute. Such permits are sometimes also loosely denominated "leases." The power to issue such permits, if it exists in the Department, would as a matter of fact be vested in the Commissioner of Indian Affairs by virtue of section 463 of the Revised Statutes, if it were not for the fact that the Secretary under his general power of supervision had issued regulations requiring that they be submitted to him for approval. It would therefore be necessary only to change the existing regulations to make such permits subject to approval by the Commissioner of Indian Affairs.

(c) *Approvals and denials of extensions of time within which timber must be removed; and timber sales and contracts for the cutting and delivery of logs on the Menominee Reservation.* This request may be intended to cover applications for extensions of time for removal of timber on all Indian lands, or only on the Menominee Indian Reservation; or extensions of time on existing contracts as well as on future contracts; or timber sales contracts (i. e., stumpage sales) rather than timber logging contracts, i. e., contracts relating to services for the cutting and removal of timber. I am informed that there are no "timber sales" (i. e., stumpage sales) now being conducted on the Menominee Reservation; any contracts under which the trees are there cut are only in the nature of logging or cutting agreements with regard to the services of the Indians in the cutting of the timber and its delivery to the Menominee Indian Mills.⁴² Again, "the extensions of time within which timber must be removed" may refer to relief against cutting requirements in any one year rather than to the extension of the whole contract term. If a modification of the contract were involved, it might require legislation such as that contained in the act of March 4, 1933 (47 Stat. 1568), as amended by the acts of June 16, 1933 (48 Stat. 311), March 5, 1934 (48 Stat. 397), and May 6, 1936 (49 Stat. 1266), specifically authorizing modification of existing Indian timber contracts, all of which acts expired on September 6, 1936. So far as concerns existing contracts, the question may be not so much one of delegation as the extent to which a Government contract may be modified.

(d) *Claims for Enrollment Rights in Indian Tribes.* The law governing enrollment, which is important in connection with the administrative distribution of tribal land, funds, and other resources, varies

⁴² The cutting of timber on the Menominee Indian Reservation is governed by special statutes, namely the act of March 28, 1908 (35 Stat. 51), as amended by the acts of March 3, 1911 (36 Stat. 1058, 1076), May 18, 1916 (39 Stat. 123, 157), March 2, 1917 (39 Stat. 969, 991), January 27, 1925 (43 Stat. 793), and June 15, 1934 (48 Stat. 964). Prior to 1908, the applicable acts were those of March 22, 1882 (22 Stat. 30), and June 12, 1890 (26 Stat. 146).

from tribe to tribe. Provision may be made for enrollment by chiefs with the approval of the Secretary; or by the Secretary with the assistance of chiefs; or by a commission, which may include Indian members, acting with the approval of the Secretary; or by the Secretary alone. There is also a general statute giving the Secretary authority to establish a final roll of membership of all tribes with a few exceptions in connection with the segregation of tribal funds.⁴³ Under constitutions adopted pursuant to the Indian Reorganization Act, the Secretary usually also has the power of reviewing or approving tribal ordinances governing future membership. While, I suppose, that it would be possible for me to undertake an examination of every one of the multitudinous statutes and treaties, in order to determine whether the power under it is delegable, I hesitate to undertake so formidable a task without definite knowledge of its necessity. The current administrative problems in connection with enrollment may be limited, and I should be advised with some particularity concerning those powers the delegation of which is contemplated.

In conclusion I should perhaps make it clear again that I have passed only on the legal validity of the delegations requested by the Commissioner of Indian Affairs. Whether any particular delegation should be made is, of course, a question of policy for the Secretary to decide. However, I believe that I should advise you that in my opinion the responsibility of my office for the review of questions of law in connection with the sale of Indian allotments, the probate of estates, and the issuance of permits should continue, at least for the present. Such supervision of the legal aspects of the performance of these functions need not, however, prevent delegations. While delegation subject to legal review will not in all cases expedite the work of the Indian Office as much as may be desired, it will at least relieve your office of a considerable burden. It will also permit a fairly flexible series of arrangements with respect to legal review which should permit a gradual diminution of matters which are not disposed of at the bureau level. My office will be glad to prepare any orders effectuating the Secretary's wishes.

DWIGHT HUNTER REAY ET AL.

Decided September 10, 1943

PUBLIC LANDS ACQUIRED FOR SPECIFIC PURPOSE—SECRETARY'S AUTHORITY TO ENTER INTO COMPENSATORY OIL AND GAS AGREEMENT—ACT OF FEBRUARY 25, 1920, AS AMENDED.

Where land is granted by United States without reservation of oil and gas, applications for lease on such land under the Mineral Leasing Act (act

⁴³ Act of June 30, 1919, sec. 1 (41 Stat. 9, 25 U. S. C. sec. 163).

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of February 25, 1920, 41 Stat. 437, 30 U. S. C. sec. 181, *et seq.*, as amended) are properly denied.

Lands acquired by War Department for specific public purpose, as distinguished from the public domain, are not subject to lease under the Mineral Leasing Act, and the Department of the Interior has no jurisdiction over and cannot issue oil and gas leases to such lands even though the lands so acquired were at one time part of the public domain.

The President has implied authority to take protective measures in cases where lands acquired for a specific public purpose are found to contain oil and gas which is being drained by adjoining owners, which authority is vested in the department or agency having jurisdiction over the land, but may be transferred to another department by Executive order.

Where an Executive Order (No. 9087, March 5, 1942, 7 F. R. 1743) transferred from the War Department to the Secretary of the Interior the President's implied authority to protect from drainage lands acquired by the War Department for use in straightening and widening the Sacramento River, these lands are not subject to the terms of the Mineral Leasing Act. The Secretary may, however, lease them or enter into compensatory agreements with oil companies operating contiguous to them.

In the absence of proof that oil company contracting with United States under compensatory agreement was drilling on or into Federal lands, it could not be held liable for drainage of gas prior to the effective date of the agreement.

Department had no authority to classify the land until after Executive Order No. 9087 (March 5, 1942, 7 F. R. 1743) was promulgated pursuant to which the Geological Survey determined the producing limits of the field.

Protests against compensatory agreements entered into with contiguous operators are without substance.

ICKES, Secretary of the Interior:

In these six cases, the applicants have unsuccessfully sought to obtain oil and gas leases to lands in or in the vicinity of the Rio Vista Gas Field in California. In two of them, Richard Davies Sawyer, 032069, and Dwight Hunter Reay, 032070, the Department has three times ruled against them; on appeal, on motion for rehearing and on submission by the General Land Office (A. 22288; April 26, 1941, June 27, 1941, September 30, 1942). As to those two cases, the so-called appeals and the three letters of Ernest Walker Sawyer dated January 5, January 18, and February 10, 1943, are treated as motions for the exercise of the Secretary's supervisory power. The other four cases have not heretofore been before the Department. As to the applications of Joseph Addison Sawyer, 034526, Richard Davies Sawyer, 034531, and Dwight L. Sawyer, 034533, we will consider

appeals from the decisions of the Commissioner of the General Land Office, dated November 5, 1942.

The application of Richard D. Sawyer, Sacramento 034767, was rejected by the register of the land office at Sacramento on October 26, 1942. On December 15, 1942, the Acting Secretary wrote Ernest Walker Sawyer in response to a letter of November 10, 1942, suggesting that the usual procedure of an appeal to the Commissioner of the General Land Office be followed. The letters of Ernest Walker Sawyer of January 5 and 18, 1943, nevertheless are addressed to the Acting Secretary, and since a decision in the five other cases will in effect dispose of this one as well, the two letters will be considered as an appeal to the Secretary from the decision of the register, a procedure which is proper although unusual.¹

The first two applications were filed January 27, 1939, the other four on June 15, 18, 19, and October 26, 1942, respectively. They each asked for leases under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 30 U. S. C. sec 181, *et seq.*, as amended). The first two applications added: “* * * and any other laws of the United States to authorize the leasing of land and the prospecting, discovery, development, production and sale of oil and gas owned by the United States.”

I am convinced that the decisions of the register, the Commissioner and the Department, denying the applications for leases and for reinstatement, and overruling the protests against the execution of the compensatory agreements with contiguous owners, are correct and should not be disturbed.

The questions raised by the applicants and considered here are: (1) Should oil and gas leases have been issued to the applicants for lands which were once public lands, which were conveyed by the United States without reservation of oil and gas rights, and which were not subsequently reacquired by the United States? (2) Should such leases have been issued for that portion of the lands so conveyed by the United States, but which were subsequently reacquired by the Government for the use of the War Department in improving navigation, (a) before jurisdiction over the oil and gas deposits were transferred by the President to this Department, and (b) after jurisdiction was so transferred? (3) Were the objections of the applicants to the compensatory agreements which were entered into by the Government with contiguous owners valid?

¹ See *West v. Standard Oil Co.*, 278 U. S. 200, 213; *Knight v. U. S. Land Ass'n*, 142 U. S. 161, 177-178.

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I

Long before any of these applications was filed, all the land involved was patented or otherwise conveyed by the United States. The instruments by which title passed from the Government contained no reservation of oil or gas, and the statutes pursuant to which they were issued required none.²

It follows that, under established law, title to any oil and gas deposits passed from the United States along with the surface.³ Consequently, the Department was without authority to lease them under the Mineral Leasing Act, which relates to "Deposits of * * * oil * * * or gas * * * owned by the United States * * *" (Sec. 1, 30 U. S. C. sec. 181).

The Attorney General recently reiterated the settled rule in his opinion of April 19, 1937, to the Secretary of the Interior, in a situation quite similar to that here considered. (39 Op. Atty. Gen. 39.)⁴ Applications had been filed for permits to prospect for oil and gas under section 13 of the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 441), as amended by the act of August 21, 1935 (49 Stat. 674), which, as did section one involved in this case, speaks of permits by the Secretary upon lands "wherein such deposits belong to the United States." The applications covered lands conveyed to the State of Kansas under the act of August 27, 1914 (38 Stat. 710), which contained no reservation of title to oil and gas and provided that the State was to use the land in a specified manner. The Attorney General held that the grant conveyed to the State

² (a) Three patents to California for swamp and overflowed land under the act of September 28, 1850 (9 Stat. 519, 43 U. S. C. sec. 982), dated July 22, 1867, July 26, 1872, and July 19, 1918. See *Work v. Louisiana*, 269 U. S. 250, 260. (b) Patent issued pursuant to act of March 3, 1851 (9 Stat. 631, 633), as amended by act of July 1, 1864 (13 Stat. 332), to John Bidwell, dated August 9, 1866, California Patent Volume 222, page 526. (c) Final cash certificate number 3428, San Francisco, issued to Duncan McCormick, November 14, 1871, under the Homestead Act of May 20, 1862 (12 Stat. 392, 43 U. S. C. sec. 161). (d) Final cash certificate number 660, Stockton, for 40 acres issued June 8, 1871, to Minerva G. Allender for Agricultural College scrip under act of July 2, 1862 (12 Stat. 503).

³ 39 Op. Atty. Gen. 39, 40 (1937); *Moore v. Smaw*, 17 Calif. 199, 79 Am. Dec. 123 (1861); *Pac. Coast Mining & Milling Co. v. Spargo*, 16 Fed. 348 (1883); *Shoemaker v. United States*, 147 U. S. 282, 308, *et seq.* (1893); *Wyoming v. United States*, 255 U. S. 489, 501 (1921); *Cf. Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669, 687-692 (1914). On loss of jurisdiction when title passes, see *Moore v. Robbins*, 96 U. S. 530, 532-534 (1877); *Putnam v. Ickes*, 64 App. D. C. 339, 344, 78 F. (2d) 223, 228 (1935). For examples of statutes expressly providing for reservation of minerals, see act of March 3, 1891 (26 Stat. 854, sec. 13), act of March 3, 1909 (35 Stat. 844, 30 U. S. C. sec. 81), act of June 22, 1910 (36 Stat. 583, 30 U. S. C. sec. 85), act of July 17, 1914 (38 Stat. 509, 30 U. S. C. secs. 121-123), section 9, act of December 29, 1916 (39 Stat. 862, 43 U. S. C. sec. 299).

⁴ See *Roughton v. Ickes*, 69 App. D. C. 324, 101 F. (2d) 248 (1938), denying mandamus for issuance of oil and gas permit or lease on the same lands, but not passing on the mineral title question.

a fee simple title *in praesenti*, subject to a condition subsequent that the land be used for the specified purposes, and that until a breach and an enforced forfeiture by the United States, the State had the same rights as if the condition did not exist. In addition, he specifically held that, having conveyed the land without a reservation of title to oil and gas deposits, the Government had no interest in the deposits. "It is familiar law," he said, "that a grant of the title to land carries with it everything embraced within the land beneath its surface, and this doctrine is applicable to grants made by the United States as well as to private grants. It has been held in numerous cases that the ownership of minerals in lands of the United States passes with the title to the lands unless such ownership is expressly reserved * * *. And oil and natural gas are minerals * * *."

It follows, that with respect to that portion of the lands which were not reacquired by the United States, the applications were properly denied.

II

(a) Most of the lands for which the applicants sought leases were, however, acquired by the United States for the use of the War Department in connection with flood control and the navigation of the Sacramento River at various times between 1911 and 1930. Despite the position to the contrary taken by the Solicitor for this Department (M. 31068, Nov. 22, 1940), the Attorney General has ruled that the Mineral Leasing Act does not apply to lands so acquired by the Government for a specific public purpose, as distinguished from the public domain. 40 Op. Atty. Gen., No. 1 (January 3, 1941); 34 Op. Atty. Gen. 171 (1924). In fact, the 1941 opinion involved lands in the very same category as those in this case, to wit, lands acquired for the use of the War Department in the performance of its function of improving navigation. So that at the time these applications for leases were filed, this Department had no jurisdiction over these acquired lands and, more specifically, in the light of the Attorney General's opinion, it must be considered as lacking any power to issue oil and gas leases, even though title to the lands was in the United States.

(b) However, the Attorney General, three months after this opinion barring the use of the Mineral Leasing Act as a means of protecting the oil and gas deposits in acquired lands of the United States from drainage, gave another opinion to the President (40 Op. Atty. Gen., No. 7, April 2, 1941). He advised the President that (1) there is an " * * * implied authority in the Executive branch to take protective measures in cases where lands acquired * * * for a specific

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public purpose are found to contain oil which is being drained by adjoining owners—such lands not being subject to the Mineral Leasing Act * * *”; (2) this authority is vested in the department or agency having jurisdiction over the land, and “includes the making of any necessary contracts”; and (3) such authority could be transferred by the President by Executive order to another department or agency, “to be exercised, however, upon the condition and to the extent that there is no interference with the primary use of the land.”

On March 5, 1942, the President signed Executive Order No. 9087 (7 F. R. 1743). The order recited the acquisition of the lands and the reported drainage of their oil and gas deposits by wells on adjacent private lands. Jurisdiction over the oil and gas deposits was transferred from the War Department to this Department and the Secretary of the Interior was directed to take necessary action to protect the United States from loss on account of drainage or threatened drainage. The Executive order preserved the primary jurisdiction of the War Department over the lands for flood control and navigation purposes, and directed that any money received was to be deposited in the Treasury as a miscellaneous receipt.

The authority which the Secretary of the Interior had the power to exercise over the oil and gas deposits in these lands after the President issued his Executive order was clearly the implied authority described in the opinion of the Attorney General of April 2, 1941, rather than the statutory authority granted by the Mineral Leasing Act, as claimed by these applicants. The Attorney General had specifically ruled that oil and gas deposits in such acquired lands are not subject to the act. He had gone on to rule that an implied power to protect the Government's property did exist when oil and gas deposits beneath its lands were being drained or threatened with drainage; and that this power could be transferred by the President from one department to another. The President thereafter issued an order in which he recited the circumstances which the Attorney General had held gave rise to the implied power, and transferred the jurisdiction to take the necessary protective action to this Department. The order does not refer to the Mineral Leasing Act at all. In fact, in at least one respect its provisions are affirmatively inconsistent with the act.⁵

The Executive order charged the Secretary with the duty of taking “such action as may be necessary to protect the United States from

⁵ Section 35 of the act, 30 U. S. C. sec. 191, provides for the disposition of 52½ per cent of receipts to the reclamation fund, 37½ per cent to the States and 10 per cent to the Treasury for credit to miscellaneous receipts. But section 4 of the order provides that all the receipts are to be paid into the Treasury and credited to miscellaneous receipts.

loss on account of drainage or threatened drainage" from the 15 parcels of land described in the order. The Attorney General had described the power to do so in general terms as one "to take protective measures" and that it included "the making of any necessary contracts." Thus, this Department was left free to determine just what necessary protective measures should be taken.

In the nature of things, however, there were only three alternatives. These were: (a) the drilling of offset wells on the Government lands by the Department itself, (b) the issuance of leases providing for the drilling of offset wells and for the return to the United States of a fair share of production or proceeds, and (c) entering into agreements with those who were draining the oil or gas from the Government deposits, which would provide for compensation for the drainage.⁶

The first alternative was entirely academic, if otherwise authorized or desirable, because of the absence of appropriated funds for any such purpose.

The second alternative was the leasing of the land. There were a number of objections, however, to leasing. (1) The Geological Survey reports that in view of the development in the field, drilling on the Federal land is unnecessary for efficient production of the underlying gas. Drilling on the land would therefore be an economic waste at any time, and especially so at this time, because the necessary strategic materials and manpower could more beneficially be used elsewhere. (2) The lands were acquired by the War Department for the purpose of widening and straightening the Sacramento River. Drilling would present at least the possibility of interference with that purpose. And even if there should be no interference with navigation purposes, the drilling might be expensive if the locations were submerged. (3) There was some uncertainty whether the United States had any mineral rights to parcels 1 to 5, because of certain reservations to which its title was subject.⁷ (4) There might have been some difficulty, during the war, in obtaining materials for drilling and in meeting Fed-

⁶ Alternatives (b) and (c) are prescribed by section 17 of the Mineral Leasing Act in relation to *public lands*. Act of August 21, 1935 (49 Stat. 676, 30 U. S. C. sec. 226). As to agreements it provides: "Whenever it appears to the Secretary of the Interior that wells drilled upon lands not owned by the United States are draining oil or gas from lands or deposits owned in whole or in part by the United States, the Secretary of the Interior is hereby authorized and empowered to negotiate agreements whereby the United States * * * shall be compensated for such drainage. * * *"

⁷ Parcels 1 to 5 had been conveyed for "widening and straightening the Sacramento River," with the right in the grantors or assigns at all times "to make such use of the lands hereby conveyed as may in the judgment of the grantees or their successors or assigns hereunder be made without interfering in any manner with the works or purposes for which this deed is made." *Cf. Yuba Inv. Co. v. Yuba Consol. Gold Fields*, 184 Calif. 469, 194 Pac. 19 (1921).

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eral spacing requirements, especially because the tracts are relatively small.⁸

If the Department had offered the lands for leasing, it would have been on a competitive basis. The reasons listed above would have tended to reduce the number of bidders and their bids. If, therefore, a satisfactory compensatory agreement could be worked out with the adjoining operators, there would be considerable advantage in protecting the Government's interests in that manner.

The Standard Oil Company of California and the Amerada Petroleum Corporation proposed such compensatory agreements to the Department on April 2, 1942, less than a month after jurisdiction over the deposits had been transferred. In view of their position in the field, this was to be expected. The field was discovered in 1936. It is by far the largest dry gas field in California. In 1942, its natural gas reserves were estimated by the Geological Survey to be about 2,472,000,000 m. c. f. which at the prevailing rate of withdrawal would not be depleted for 122 years.⁹ The total estimated area of the field was 26,048 acres. Of this, six companies controlled 22,793.96 acres and were the only operators in the field. Among these six were Standard and Amerada.¹⁰ Forty-eight productive gas wells had been drilled at an average spacing of 474.87 acres per well. All the gas produced in the field was and is allocated among the six companies according to a so-called "Method of Allocation" on which they have agreed. By its terms, a committee determines from time to time the estimated productive limits of the field. Each property upon which a gas well has been drilled participates in the total available gas produced, in the ratio that the area of that part of the property within the estimated productive limits of the field bears to the total participating area. The total participating acreage controlled by Standard and Amerada exceeded by far that of all other operations.¹¹ Moreover, each of the two companies controlled substantial tracts which were contiguous to those Government lands which were considered by the Geological Survey to be within the producing limits of the field. These Government lands consisted of (a) all of parcels 1, 2, 3 and 4, and part of 15; and (b) all of parcel 5 and parts of 10 and 11. The former group totaled 348.58 acres and was contiguous to large tracts

⁸ See War Production Order M-68, December 23, 1941, 32 CFR 1047.1, as amended January 4, 1943, and March 30, 1943, 32 CFR 1515.6.

⁹ The Petroleum World for July 1943 (p. 23) reports the discovery of a new gas producing zone, which it claims should add as much as one-third to the reserves.

¹⁰ The others were the Texas Company, The Superior Oil Company, Jergins Corporation and the Natural Gas Corporation.

¹¹ As of November 5, 1942, of the total participating area of 22,959 acres, Amerada controlled 10,430; and Standard 6,062, plus a half interest in 2,181.

of Amerada. The latter group totaled 423.74 acres and was contiguous to large tracts of Standard. All of the lands adjacent to the Government parcels and most of the lands near them were controlled by the two companies.

The proposals made by Amerada and Standard were in all material respects the same, except for the parcels affected. In the case of Amerada, the parcels were 1, 2, 3, 4 and 15; of Standard, 5, 10 and 11. They each were willing to pay a compensatory royalty to the Government, equivalent to $1/6$ of that proportion of the total production of gas from the field for that month, which the acreage of the Government parcels within the producing limits bore to the total participating acreage within the field, at the average price received by Standard or Amerada, as the case might be, for its sales during that month. The agreement was to continue as long as gas was produced in commercially paying quantities. The companies stated that similar compensatory royalty arrangements had been made by them on a $1/8$ royalty basis with the Sacramento and San Joaquin Drainage District, the State Board of Reclamation and the County of Solano as to land owned by these Agencies in the field in or adjacent to the Sacramento River.

As a result of counterproposals contained in letters of the Assistant Secretary to Amerada and Standard, dated May 23, 1942, and further negotiations between the companies and the Geological Survey, the terms to which the companies were finally willing to agree were substantially changed. On July 16, 1942, the two companies tendered agreements executed by them and dated July 1, 1942. The agreements were to be effective as of that date. The term was to be 20 years, or sooner if and when commercial production of gas in the field ceased.

Compensation to the United States was to be paid monthly, as follows: As a minimum, it was to be the product of "Market Value" for the preceding calendar month and $1/6$ of "Government Allotment" for that month. Market value was defined as the weighted average price per m. c. f. received by each respective company for all gas sold by it from the field. "Government Allotment" was defined as the quantity of gas allotted each month to the Government's land, determined by multiplying the total production of the six operators in the field by the ratio of the area of the Government land within the producing limits to the total participating area for the entire field. This payment, it will be observed, is the same as the $1/6$ royalty originally proposed by the companies. In addition, the United States was to receive that sum, if any, by which 50 percent of the cumulative "net profits" up to the end of such calendar month

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shall exceed the aggregate of all sums theretofore paid and the amount contemporaneously payable as the minimum. "Net Profits" was to be the amount by which "Gross Proceeds" exceeded "Chargeable Expenses." "Gross Proceeds" was to be the total sum received by each company, resulting from applying "Market Value" to the Government allotment. The "Chargeable Expenses" for each agreement was to be (1) \$25,000, representing one-half of the cost of drilling one well, (2) \$100 monthly to cover operating and maintaining one well; and (3) a part of personal property, mineral rights and production taxes, proportioned according to the relation of the Government's allotment of production to each company's total production in the field.

These rather complicated provisions reduce themselves to two types of payments to be made to the Government. A royalty of $1/6$ the sales price of the gas attributed to the Government acreage was to be paid in any event. In addition, the Government was to receive one-half of the cumulative "profits" from the sale of the gas attributed to the Government lands to the extent that they exceeded the royalty payments. The "profits" were the gross proceeds attributable to the Government parcels less (a) \$25,000 over the life of the agreement, (b) \$100 a month, and (c) a proportionate part of property and production taxes; the \$25,000 was supposed to be one-half the cost of drilling a well and the \$100 the monthly operation and maintenance cost of one well. For the 20-year life of the agreement, then, the expenses attributable to the Government in the determination of net profits amounts to a proportionate part of the taxes plus the expenses of roughly two-thirds of a well in each agreement, on the basis of the cost estimates reflected by the contract.

These terms seemed to the Department to be as good or better than any likely to be obtained from leasing its parcels during the probable 20-year term of the agreements, and to be free of the other objections to disposition by lease. Accordingly, the final proposals of the companies were accepted, and the agreements executed on behalf of the Government by the Assistant Secretary on September 17, 1942. However, by their terms the effective date of the agreements was July 1, 1942.

The foregoing discussion has not covered that portion of the lands transferred by the Executive order which are not considered by the Geological Survey to be within the producing limits of the field. Lands in this category are included in applications 034526, 034533 and 034767 of Joseph Addison Sawyer, Dwight L. Sawyer and Richard Davies Sawyer, respectively. The order directs the Secretary to "take such action as may be necessary to protect the

United States from loss on account of drainage or threatened drainage of oil and gas from such lands." Such portion of the lands cannot reasonably be considered subject to drainage or threatened drainage. Hence, the Secretary is without authority to take any protective action. See 40 Op. Atty. Gen., No. 7, April 2, 1941.

The Sacramento 034767 application of Richard D. Sawyer described lands which were either (a) outside the estimated producing limits, or (b) covered by the compensatory agreements. With respect to the former, there was no authority to lease. And as to the latter, the application came too late. The agreements were signed by the Assistant Secretary on September 17, 1942; the application was filed October 26, 1942.

In all the circumstances, the decisions not to lease any of the War Department lands covered by the Executive order were authorized and proper.

III

The applicants have urged a number of unsubstantiated and unjustified objections to the compensatory agreements.

(a) It is said that the agreements do not take into account the fact that Standard has been "stealing" or taking gas from Federal lands, before July 1, 1942. But under the established rule of capture, as long as Standard was not drilling on or into Federal lands, and there is no reason to believe that it was, it was within its rights regardless of whether it was in fact draining gas deposits which were under lands owned by the United States.¹² Specific reference is made to alleged whipstocking or directional drilling of three wells from Standard property out under Federal lands, wells known as State 1, 2 and 3. But in fact these wells have not been drilled on or into lands owned by the United States.

(b) "The \$50,000 allowed Standard Oil and Amerada for the cost of a well drilled for the purpose of stealing gas" is said to be unwarranted. The chargeable item of \$25,000 in each agreement is not identified with any particular well, but represents one-half of the approximate average cost of drilling a well in the field. It was merely a convenient measure of expense properly attributable to the Government lands for the purpose of computing the 50 percent of profits payment. As indicated above, there is no evidence of any "stealing" of gas by drilling on or into Federal lands.

(c) The \$100 chargeable against gross proceeds in each agreement is criticized as too high. This item covers "cost of operating, maintaining, cleaning out, repairing, replacing equipment, deepening and

¹² Summers, *Oil & Gas*, secs. 62, 63.

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redrilling one well" in the field. In the light of cost of past operations in the field, this charge is considered reasonable.

(d) The applicants assert that the "772.32 acres mentioned in the contracts of July 1, 1942, does not include several large pieces of Federal lands which are very definitely being drained daily." The Geological Survey reports that available evidence fails to disclose any drainage loss from any of the Federal land covered by the Executive order which is not included in the 772.32 acres described in the contracts. The only specific land which is not included in the agreements and which it is asserted is being drained is Wood Island. But that island was patented by the United States to the State of California on July 26, 1872, by Sacramento Swamp Land Patent No. 1, without any oil or gas reservation. Apparently, the State thereafter conveyed its title. On August 11, 1943, we were advised by the War Department that the State again acquired the island in fee "for use by the United States in the Flood Control Plan of the Sacramento River. The State of California did not convey the title to Wood Island to the United States, but granted permission to the California Debris Commission to dredge and remove Wood Island in accordance with said Flood Control Plan. At this time, Wood Island has been removed from the Sacramento River. No mineral interests were conveyed by the State of California to the United States."

(e) It is suggested that under the contracts, the Government does not get its full return, because the companies withhold "at least 41- $\frac{2}{3}$ percent of the production on that 772.32 acres." We do not know how the "41- $\frac{2}{3}$ percent" is computed. If the suggestion is based on the assumption that the Government should not share with the companies in any form the proceeds of the gas attributable to the Federal land, then the assumption is fallacious. Under the system of allocation operative in the field, only those who control a tract on which there is a well participate on a full proportionate acreage basis. But apart from this, the only way to obtain the entire actual gas production of a given tract is by drilling, which involves substantial initial and continuing expenses, as against which the Government here makes no cash investment and receives substantial returns.¹³

(f) The applicants say that if the acreage had been put up at auction on a 1/6 royalty basis on July 1, 1942, or now, "there would

¹³ For the first year of the contracts, ending June 30, 1943, after charging off the \$25,000 drilling items and the other chargeable expenses, the Government has received from Standard \$63,637.01, from Amerada \$59,215.57, a total of \$122,852.58. Of this total, the minimum 1/6 royalty payments amounted to \$50,940.87; the additional "profit" payments, \$71,911.71. In succeeding years, the \$50,000 will not be a chargeable item.

be some very spirited bidding for it, with a bonus of several thousand dollars per each acre." It is of course speculative whether this would actually have been or be the case, particularly in view of the difficulties facing a lessee of these lands. The leasing would have been a better bargain only if besides the 1/6 royalty, a bonus would have been received which would exceed the "net profits" payments over the life of the contract. This, at best, is not demonstrable, and the applicants do not so assert.

(g) It is urged that "Exhibit A," attached to the contracts, "is incorrectly dated September 10, 1940, which I claim was deliberately done to mislead the Department." The map referred to is dated September 10, 1940, and was submitted by the companies with their proposals of April 2, 1942. It was described by them as "a map which outlines the present limit of the estimated productive area." The Geological Survey found the estimated productive area so outlined to be accurate. We fail therefore to understand just how the Department was misled.

(h) The agreements, more particularly the provision under which the Government agrees not to develop or permit others to develop the lands included in them, is charged to be "in contravention to the will of Congress in the Mineral Leasing Act of 1920." That statute, as we have shown, has been held by the Attorney General to be inapplicable to these lands.¹⁴ But even if this were not the case, that act specifically permits a choice of either leasing or entering into such agreements. (See footnote 6, *supra*.)

(i) The complaint is made that the Department was asked to classify this land at various times both before and after the promulgation of the Executive order, and failed to do so. The answer is that before then, the Department had no power or function in relation to the land; thereafter the Geological Survey did in fact determine which portion of the land was within and which without the producing limits of the field.

(j) It is said that Standard and Amerada were singled out and the agreements made with them, though there are other operators in the field. Standard and Amerada, as we have shown, were the operators who, because of control of most of the participating acreage and of adjacent lands, would be most directly affected by drilling on Gov-

¹⁴ It is true, the agreements recite that "the Secretary of the Interior represents that he has the power and authority under the provisions of said Executive order, and his general administrative authority, including powers vested in him by the act of February 25, 1920 * * * and other applicable acts of Congress, rules, regulations and orders, to enter into this agreement." This provision was in the drafts submitted by the companies. The reference to the 1920 act was inadvertently retained. But in its context it is meaningless in fact, and, in view of the Attorney General's opinion, can have no significance in law.

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ernment lands. Consequently they were willing to pay compensation for agreements not to drill or permit drilling. The other operators were not in that position. In any event, the compensation payable to the Government under the agreements fixes the portion of the production of the entire field allocable to the Government land, by relating Government acreage to all the participating acreage in the field.

IV

With respect to Sacramento 032069, 034531, and 034767, the applicant Richard D. Sawyer entered military service on October 31, 1942. It is doubtful whether, as claimed, the Soldiers' and Sailors' Civil Relief Act of 1940 (act of October 17, 1940, 54 Stat. 1178, amended October 6, 1942, 56 Stat. 769, 50 U. S. C. sec. 510, *et seq.*) is applicable in the circumstances. The only section of conceivable relevance is subsection 1 of section 501 (50 U. S. C. sec. 561) which provides that "No right to any lands owned or controlled by the United States initiated or acquired under any laws of the United States, including the mining and mineral leasing laws, by any person prior to entering military service shall during the period of such service be forfeited or prejudiced by reason of his absence from the land or his failure to perform any work or make any improvements thereon or his failure to do any other act required by or under such laws." We are not aware of any right of Richard D. Sawyer, which has been forfeited or prejudiced by his failure to do any act required by or under any law of the United States. However, this decision is, in any event, to be without prejudice to any rights which Richard D. Sawyer may have under the Relief Act.

The motions for the exercise of the supervisory power of the Secretary are denied and the decisions of the Commissioner and the Register affirmed, without prejudice however to such rights as Richard D. Sawyer may have under the Soldiers' and Sailors' Civil Relief Act.

So Ordered.

LIABILITY OF INDIAN TRIBES FOR STATE TAXES IMPOSED ON ROYALTY RECEIVED FROM OIL AND GAS LEASES

Opinion, September 20, 1943

INDIAN TRIBES—TAXATION—OIL AND GAS LEASES—ROYALTY—UTE MOUNTAIN TRIBE OF INDIANS—BLACKFEET TRIBE OF INDIANS—ACT OF FEBRUARY 28, 1891—ACT OF MAY 29, 1924.

The act of May 29, 1924 (43 Stat. 244, 25 U. S. C. sec. 398), under which the leases in question were made, authorizes the taxation by the States

of the production of oil and gas on unallotted lands in all respects the same as production on unrestricted lands and authorizes the Secretary of the Interior to cause the tax assessed against royalty interests to be paid.

The Ute Mountain and Blackfeet Tribes are liable for the taxes levied against their interests because all of the taxes sought to be collected on their royalty interests are within the permissive act of Congress.

HARPER, *Solicitor*:

You [Secretary of the Interior] have presented for my opinion the question of the liability of the Ute Mountain and Blackfeet Tribes of Indians for certain taxes imposed by the States of New Mexico and Montana, respectively, on the tribes' royalty interests in oil and gas mining leases. Both of these tribes receive royalty from leases executed pursuant to section 3 of the act of February 28, 1891 (26 Stat. 795), as amended by the act of May 29, 1924 (43 Stat. 244, 25 U. S. C. sec. 398), authorizing the leasing of unallotted Indian lands for mining purposes. The amendatory act of May 29, 1924, *supra*, provides that—

* * * the production of oil and gas and other minerals on such lands may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands, and the Secretary of the Interior is authorized and directed to cause to be paid the tax so assessed against the royalty interests on said lands: *Provided, however*, That such tax shall not become a lien or charge of any kind or character against the land or the property of the Indian owner.

The question for consideration is whether the permission granted by Congress for the taxation of the production of oil and gas extends to the particular taxes which the States of New Mexico and Montana are attempting to collect from the royalty interests of the Indians.

The State of New Mexico levies what is known as a severance tax on certain natural resource products, including oil and gas, severed from the soil of the State. Such tax is payable by the owner or proportionately by the owners thereof at the time of severance.¹ The rate of the tax on oil is two percent of the value thereof.² The tax is required to be paid by those actually engaged in the operation of severing. The reporting taxpayer is authorized to collect and withhold out of the value of said products so severed the proportionate parts of the total tax due from the respective owners of the severed products at the time of the severance.³

¹ Laws of New Mexico, 1937, ch. 103, sec. 1; sec. 76-1301, New Mexico Stat., 1941, Ann.

² Sec. 2; 76-1302.

³ Sec. 6; 76-1306.

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The act provides:

Every person actually engaged in the severing of any of said products mentioned herein from the soil or actually operating the properties from which said products are severed under contracts or agreements requiring royalty interest, excess royalty, or working interest, either in money or in kind, is hereby authorized, empowered, and required to deduct from any amount due or from anything due, the amount of tax herein levied before making such payments; Provided, however, no such deductions shall be made from any amount or amounts due the United States of America or the State of New Mexico as royalty or rental payments.⁴

The act further provides:

The payment of the severance tax levied by this act shall be in addition to and shall not affect the liability of the party or parties so taxed for the payment of all state, county, municipal, district and special taxes levied upon their real estate and other corporeal property, including the emergency school tax, production, and other special taxes. No severance tax shall be levied by any county or other political subdivision of the state.⁵

Both the States of New Mexico and Montana have in recent years set up administrative agencies for the regulation of oil and gas wells and both States levy a tax on oil produced in addition to all other taxes for the purpose of meeting the expense of such boards. Both States are attempting to collect these taxes from the royalty interests of the Indians.

The State of New Mexico levies a tax of one-eighth of one per cent on the proceeds of all oil and gas produced in the State except royalties payable to the United States⁶ or to the State.⁷ For the purposes of this opinion I shall designate this tax as "the oil conservation fund tax." The tax is collected in the same manner as the severance tax is collected.

The State of Montana levies what it terms a "privilege and license tax" of one-fourth of one cent on every barrel of petroleum produced in the State. The producers are required to pay the tax on petroleum produced for themselves as well as for royalty holders and are to be reimbursed by the royalty holders for the tax paid on their interests

⁴Sec. 7; 76-1307.

⁵Sec. 15; 76-1315.

⁶The State cannot be presumed to have intended to include the Indians' royalty interests in the exemptions granted on royalty paid to the United States in this and in the severance tax act. See in this connection Laws of New Mexico, 1925, ch. 83, sec. 2, p. 126; sec. 76-1002, New Mexico Statutes, 1941, Annotated, where the State legislature, in providing for an operators' net proceeds tax, permits the deduction of royalties paid "to the United States, or to any Indian tribe or Indian, being wards of the United States, or the State of New Mexico."

⁷Laws of New Mexico, 1935, ch. 72, sec. 25; sec. 69-231, New Mexico Statutes, 1941, Annotated.

in the same manner as the producers are reimbursed for the net proceeds tax paid on crude petroleum produced for others.⁸

In my opinion, all of these taxes are within the permissive act of Congress and must be paid out of the royalty interests of the Indians.

The act of May 29, 1924, *supra*, was considered by the Supreme Court of Montana in the case of *British-American Oil Producing Company v. Board of Equalization, et al.*, 54 P. (2d) 129. There the oil company, the owner of a producing oil and gas lease on lands within the Blackfeet Indian Reservation, sought to enjoin the State Board of Equalization from collecting the Montana "corporation license tax," the "operators' net proceeds tax," an oil producers' license tax termed by the court a "gross production tax," and the "royalty owners' net proceeds tax" all arising out of the production and recovery of oil from the leased lands. The Blackfeet Tribe intervened, alleging that by reason of certain treaties and acts of Congress the lands embraced within its reservation were tax exempt and that the oil produced from the tax-exempt lands and the royalty derived from the production of oil were likewise exempt from taxation.

The Montana Supreme Court and the United States Supreme Court on appeal⁹ ruled that all of these taxes fell within the permission given by the act of 1924.¹⁰ The taxes under consideration must likewise be held to be within that permission. The language of the statute is that the "production of oil and gas and other minerals * * * may be taxed by the State in which said lands are located in all respects the same as production on unrestricted lands." All that is essential to the validity of the tax under this broad language is that the tax be one on mineral production and that it be exacted from production on unrestricted lands. The taxes under consideration meet both of these requirements.

My attention has been called to the fact that the Office of Indian Affairs at one time authorized the payment of the Blackfeet Tribe's proportionate share of the Montana "privilege and license tax" but that the Department has recently refused to authorize the payment of this tax as well as "the oil conservation fund tax" levied by the State of New Mexico. Such refusal was based on the premise that

⁸ Laws of Montana, 1937, ch. 123, sec. 1; Revised Codes of Montana, 1935, vol. 2, 1939 pocket part, sec. 3554.14.

⁹ 299 U. S. 159.

¹⁰ Both courts assumed, under the then prevailing rule laid down in *Choctaw, O. & Gulf R.R. Co. v. Harrison*, 235 U. S. 292; *Indian Territory Co. v. Oklahoma*, 240 U. S. 522; and *Jaybird Mining Co. v. Weir*, 271 U. S. 609, that even a lessee's interest in oil produced from restricted Indian lands could not be taxed without the consent of Congress. While that rule has now been renounced (*Helvering v. Mountain Producers Corporation*, 303 U. S. 376), so that the State is free to tax a lessee's interest without congressional consent, the renunciation of this rule does not detract in any way from the validity of the interpretation given by the courts in this case to the 1924 act so far as it affects the taxation of the Indians' royalty interests.

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the act of May 29, 1924, *supra*, authorized the levy of a gross production tax only and that any other tax levied by the States was unauthorized. *Oklahoma ex rel. Oklahoma Tax Commission, et al. v. Barnsdall Refineries, Inc., et al.*, 296 U. S. 521, was relied on to support this position. There the Supreme Court had under consideration a much more limited assent by Congress to the taxation of the Indians' royalty interests. Congress had authorized the State of Oklahoma to levy a gross production tax on all oil produced in Osage County, Oklahoma, and the Secretary of the Interior was authorized to pay such gross production tax in lieu of all other State and county taxes levied on the production of oil and gas as provided by the State law. The Secretary was also authorized to pay an additional sum of one percent of the amount received by the Osage Tribe of Indians as royalties from the production of oil and gas, such sum to be used by Osage County for the construction and maintenance of roads and bridges in the county.¹¹

The State of Oklahoma thereafter enacted a law providing for a tax of one-eighth of a cent per barrel on oil produced in the State. The question before the court was whether that tax, when applied to oil produced by lessees on lands of the Osage Tribe of Indians, was within the congressional consent. The court held:

Congress, in removing the tax immunity, thus had in contemplation the particular tax then on the statute books of Oklahoma, then and ever since described as a gross production tax, the benefits of which would inure to Indians in Osage County by the distribution of a part of the tax to that county. The section bears its own evidence of the intention that the waiver of tax immunity of the production of oil from Indian lands was to be limited to a tax having these characteristics. The tax is described as a gross production tax. It is to be "paid and distributed, and in lieu of all other state and county taxes levied upon the production of oil and gas as provided by the laws of Oklahoma, * * *." The reference must be taken to be to the laws then in effect, unless we are to indulge the improbable assumption that the state was to be left free to dispense with the requirement that the tax permitted was to be in lieu of all other taxes.

* * * * *

The Supreme Court of Oklahoma emphasized the fact that the $\frac{1}{8}$ of a cent per barrel tax, denominated by the statute an "excise," is an excise tax distinguishable from a property tax in lieu of which the gross production tax is levied, and different from the gross production tax in its temporary character and the method of its computation and distribution, and so concluded that it is not a tax contemplated by the congressional consent. Construing that consent with the strictness appropriate to the interpretation of a waiver of a defined tax immunity of the sovereign, we think the conclusion of the state court was right.

¹¹ Section 5 of the Act of March 3, 1921 (41 Stat. 1249, 1250).

That decision cannot be relied upon as authority for refusing to pay taxes levied by other States under the authorization contained in the act of May 29, 1924. There the tax authorized to be collected was named—a gross production tax—and was to be in lieu of all other taxes. In the 1924 act neither of these limitations appears.

At the time the act of May 29, 1924, was under consideration by the House of Representatives the question was raised as to the situation with respect to taxation. The statement was made that since Congress had recently passed two acts requiring the Quapaw Indians¹² and the Osage Indians¹³ to pay the gross production tax to the State it was thought only fair, inasmuch as that same kind of taxation was going to be extended, perhaps, into various States, that the gross production tax should go to the upbuilding of the State. The statement was also made that the bill under consideration gave the State the same kind of tax as was given under the Osage act.¹⁴ It is significant to note, however, that the wording of the two sections is materially different. The wording of the Quapaw act referred to in the debate is identical with the 1924 act. It must be assumed that had Congress intended to limit the right of the States to a tax on the gross production, in lieu of all other taxes, as was done in the Osage act, Congress would have chosen the words of that act rather than the broader words of the Quapaw act.

My conclusion is that the States of New Mexico and Montana, in seeking to impose the taxes under consideration, plainly come within the permission given by the act of May 29, 1924. This conclusion makes it unnecessary, of course, to decide whether such taxes could be validly assessed and collected by the States in the absence of congressional consent (compare *Oklahoma Tax Commission v. United States*, 319 U. S. 598).

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

LYDIA BELLE LUHMAN

Decided September 30, 1943

OFFICERS AUTHORIZED TO ADMINISTER OATHS IN PUBLIC LAND CASES—EXTENT
OF THE JURISDICTIONAL RESTRICTION IMPOSED BY REV. STAT. SEC. 2294 AS
AMENDED AND CIRCULAR 884 OF SEPTEMBER 3, 1926.

Sec. 210.1, Code of Federal Regulations, Title 43, drawn from Circ. 884
of September 3, 1926, imposing a jurisdictional limitation on officers author-

¹² Section 26 of the act of March 3, 1921 (41 Stat. 1225, 1249).

¹³ Section 5 of the act of March 3, 1921 (41 Stat. 1249, 1250).

¹⁴ 65 Cong. Rec. 6855 (1924).

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ized to administer oaths in all public land cases in both the United States proper and Alaska is without authority from Rev. Stat. sec. 2294, which it implements, and is incompatible with the statute controlling public lands in Alaska.*

Rev. Stat. sec. 2294, as amended, limits the jurisdictional restriction which it imposes to proceedings under five laws only.

An applicant for Alaska public lands may make oath before any qualified officer in the United States or in Alaska.

EXECUTION OF OATHS UNDER LAWS NOT SPECIFIED BY REV. STAT. SEC. 2294—
FIVE-ACRE ACT SILENT—REGULATIONS.

In cases arising under public land laws other than those specified in Rev. Stat. sec. 2294, the execution of oaths is controlled by the terms of those other statutes or, if they be silent, by the Secretary's regulations thereunder.

Where an Illinois citizen applies for a small tract in Wyoming for summer vacation purposes under the act of June 1, 1938 (52 Stat. 609, 43 U. S. C. sec. 682a), she is not required by the statute to go to Wyoming to make oath to her application before a qualified Wyoming officer but under the regulations may go before any other officer in the United States who is qualified to administer oaths.

CHAPMAN, *Assistant Secretary*:

Lydia Belle Luhman of Garden Prairie, Illinois, has appealed from the decision of the Commissioner of the General Land Office of March 27, 1943, holding for rejection her application, Cheyenne 065016, to purchase certain Wyoming land under the Five-Acre Act of June 1, 1938 (52 Stat. 609, 43 U. S. C. sec. 682a). The land sought, described by metes and bounds, is situate in Sec. 7 of T. 32 N., R. 79 W., 6th P. M., Wyoming. On May 12, 1941, it was classified by the Secretary and opened for leasing as a cabin, health, convalescent or recreational site. On the supplemental plat accepted on May 26, 1942, it appears as lot 21 of Tract 43 and contains 4.72 acres. Appellant wishes to use this tract as a cabin site for summer vacations.

The Commissioner held the application for rejection. He pointed out that the present policy of the Department is to lease rather than sell tracts under this law; that a lease may be renewed and that a lessee may have a preference right to buy the leased land should the Secretary later decide to sell the land. The Commissioner therefore gave applicant leave to file, in accordance with the governing regulations, an application to lease, not purchase. He also stated that it had been sworn to before a notary public in the State of Illinois instead of before a qualified officer in the State of Wyoming as required by the Code of Federal Regulations (43 CFR 210.1) and therefore could not be accepted.

* Sec. 210.1 has been appropriately revised by Circ. 1575 approved June 13, 1944.

A letter of May 3, 1943, addressed to the Commissioner by applicant's attorney, Edward E. Murane of Casper, Wyoming, has been treated as an appeal. The attorney had inquired of the register whether he would be authorized to file application for his client under a power of attorney from her. This question the register did not answer but gave applicant 30 days in which to communicate with the General Land Office on the matter. The attorney considers it unreasonable that an applicant desiring a small tract of land for a summer residence only should be required to travel from Illinois to Wyoming simply to make oath to her application before a Wyoming officer qualified to administer oaths. He argues in effect that in this period of national emergency when the Government is making every effort to curtail public travel it would be contrary to the public interest to require the applicant to take this trip to make an oath which she could make before a notary public in her home town if the regulations were reasonable and practical. He suggests that if the Code of Federal Regulations does not permit waiver of the requirement the Secretary be requested to exercise his supervisory authority and waive it.

The regulation cited, 43 CFR 210.1, is entitled, "Officers Authorized to Administer Oaths In Public Land Cases" and its relevant provisions are as follows:

Section 210.1 *Officers qualified; affidavit and certificate of official character required in certain cases.* Under authority of Section 2294, Revised Statutes, as amended by the Acts of March 11, 1902 (32 Stat. 63); March 4, 1904 (33 Stat. 59), and February 23, 1923 (42 Stat. 1281; 43 U. S. C. 254), and as supplemented by the Acts of May 17, 1926 (44 Stat. 558; 43 U. S. C. 75a) and July 3, 1926 (44 Stat. 830; 5 U. S. C. 92a), oaths in public land cases may be executed before the register or the acting register of the United States Land Office and, in Alaska, before the receiver (where there is a receiver), or before a United States Commissioner, or a notary public, or before a judge or clerk or prothonotary of a court of record, or the deputy of such clerk or prothonotary, or before a magistrate authorized by the laws of the State, District, or Territory of the United States to administer oaths, in the county, parish, or land district in which the land lies, or before any officer of the classes mentioned who resides nearer or more accessible to the land, although he may reside outside of the county and land district in which the land is situated.

* * * * *

Except as to the register or the acting register, the official character of any officer not using a seal of office must be certified to under seal by the clerk of court having the record of his appointment and qualifications. [Circ. 884, Sept. 3, 1926, 51 L. D. 573]

From this language it is clear that while numerous categories of officers may administer oaths hereunder not all members of those classes may do so. Those who may are limited to those who by law

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are authorized to function in the land district or the county where the land concerned lies. According to the section's title and the use of the general comprehensive term "oaths in public land cases," this limitation appears to obtain in *all* public land cases not only in the United States proper but in Alaska as well. Yet such general application of the restriction to public lands in the United States proper finds no authorization in Rev. Stat. sec. 2294, to which this regulation looks for authority, and it is incompatible with the statute which controls as to public lands in Alaska.

As regards Alaska, any officer in the United States outside of Alaska who is authorized by law to administer an oath may administer an oath to an applicant for entry of Alaska lands. For section 10 of the act of May 14, 1898 (30 Stat. 409, 413; 48 U. S. C. sec. 359), provides in part as follows:

All affidavits, testimony, proofs, and other papers provided for by the provisions of this chapter concerning public lands, or by any departmental or Executive regulation thereunder, by depositions or otherwise, under commission from the register of the land office, which may have been or may hereafter be taken and sworn to anywhere in the United States, before any court, judge, or other officer authorized by law to administer an oath, shall be admitted in evidence as if taken before the register of the proper local land office.¹

As regards lands in the United States outside of Alaska the limitation, far from obtaining in *all* public land cases, can affect only those cases specified in the statute which this regulation implements. That statute is section 2294, Revised Statutes, as amended or supplemented by the acts cited in section 210.1. It limits itself to the execution of proofs, affidavits and oaths required of applicants and entrymen under five laws only, namely, the homestead, preemption, timber-culture, desert land, and timber and stone acts. Of these, the preemption and timber culture acts have been repealed. Hence today only homestead, desert land and timber and stone cases fall under this section of the code and its limitation. As entitled and codified in 43 CFR 210.1 the regulation implementing section 2294 should therefore be revised.

In cases arising under public land laws other than those specified in section 2294 the execution of oaths is controlled by the terms of those other statutes or, if the statutes be silent on the point, by the regulations prescribed by the Secretary thereunder. For example, the verification of certain affidavits affecting mineral lands is controlled by section 2335, Revised Statutes.² Again, in the matter of

¹ See *General Land Office instructions of June 8, 1898*, regarding this act, 27 L. D. 248, par. 6, p. 249; 260. See also 43 CFR 81.2.

² Act of May 10, 1872 (17 Stat. 95; 30 U. S. C. sec. 40).

oil and gas prospecting permits and leases the regulations³ of May 7, 1936, prescribed for the administration of those sections of the leasing act of February 25, 1920 (41 Stat. 437), which were amended by the act of August 21, 1935 (49 Stat. 674), require an application for an oil and gas lease to be under oath but even permit it to be made by the applicant's attorney in fact.⁴ In that case the power of attorney and the applicant's own affidavit as to his citizenship and holdings must be attached. But there is no requirement that the oath be made before an officer in the land district or in the county where the lands to be leased lie or before an outside officer authorized to function therein.

As for the Five-Acre Act, the statute itself makes no provision as to the execution of the application thereunder, thus leaving to the Secretary prescription of the requirements to be met. The approved regulations in both Circular 1470 and Circular 1470a have provided in footnote, p. 13, par. 9 as follows:

9. The application must be executed under oath. It may be sworn to before the register or the acting register of the proper district land office or before any other officer qualified to administer oaths. Except as to the register, or the acting register, the official character of any officer not using a seal of office must be certified to under the seal of the clerk of court having the record of his appointment and qualifications. Only the original application need be sworn to.

This makes an oath obligatory but gives the applicant a choice as to the officer before whom he will swear to his application. He may go before the register of the "proper district land office," which is the land office of the district where the land lies, or he may go before any other officer at all, anywhere, who is qualified to administer oaths.

Grammatically, the limiting prepositional phrase "of the proper district land office" modifies only the substantive term "the register or the acting register." It is not to be implied as modifying the term "any other officer" as well. Had the regulation been intended to apply the limitation of place to that officer also, the phrase would have had to contain some locative word, in that case reading perhaps "or before *any other officer therein* qualified to administer oaths." But no such locative word does appear and there is no authority for importing any into the text.

It is also to be noted that had it been intended to adopt the rule as laid down in section 2294 for homestead, desert land and timber and stone cases, the regulation would have had to provide also for an oath to be taken before the nearest or most accessible officer qualified to

³ Circ. 1386, par. 10, p. 5. See also 30 U. S. C. sec. 190.

⁴ See Edwina S. Elliott, 56 I. D. 1.

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function where the land lies even though such officer might reside in a different land district or county. But, again, there is no such provision. In consequence, it can only be concluded that the regulation was not intended to adopt either in whole or in part the limitation contemplated by section 2294 but was meant to give to applicants the choice which its language as it stands purports to describe.

Nor does the Department see any reason why the regulation under the Five-Acre Act should follow or adopt the rule prescribed by section 2294. To accord the option described in nowise contravenes the statute. It does not interfere with good administration. Moreover, it accommodates applicants and there is good precedent for that. It is not to be forgotten that under the original homestead law of May 20, 1862 (12 Stat. 392), the convenience of applicants was not consulted and authority to administer oaths to them was reposed in but one officer, the register of the appropriate land district. It was early seen however that this narrow rule inflicted considerable hardship upon settlers in undeveloped country. It was for their benefit primarily that the authority to administer oaths was extended by successive statutes to more and more classes of officers who might be more easily reached than the register. As the first⁵ of these statutes puts it, the affidavit might be made before the clerk of the court for the county in which the applicant was an actual resident when he could show that certain facts as to a *bona fide* settlement obtained *and that he was prevented from personal attendance at the district land office by distance, bodily infirmity, or other good cause.*⁶

In the instant case the Department finds that 43 CFR 210.1 is inapplicable; that the regulation quoted from Circular No. 1470a controls here, quite properly making no requirement that applicant swear to her affidavit in Wyoming; and that appellant is entitled to make such oath as may be required in the premises before a notary public of established authority in any State in the Union. Accordingly, the Commissioner's decision that appellant's application was not properly executed is reversed. But the Department supports the Commissioner's position that the site at present is open to lease not purchase. The Department therefore rejects the instant application with leave to appellant to apply for a lease of the site in question.

So Ordered.

⁵ Act of March 21, 1864 (13 Stat. 35).

⁶ Section 2294, Revised Statutes (1878).

K. E. SALTGAVER ET AL.

Decided October 25, 1943

OIL AND GAS LEASES—DISCOVERY OF NEW FIELD—ROYALTY OBLIGATIONS OF LESSEES—ACT OF DECEMBER 24, 1942.

The development of a well from which there was sustained production of oil from and after October 25, 1942, does not entitle the lessees on whose leased land the well was developed to the benefits of the act of December 24, 1942, which offers a bounty in the form of a royalty rate of 12½ per cent for prospecting resulting in the discovery of a new field or deposit.

STATUTORY CONSTRUCTION—RETROSPECTIVE EFFECT OF STATUTE—TIME OF THE EFFECTIVENESS OF A STATUTE.

In the absence of an unequivocal expression of the legislative intent that a statute shall operate retrospectively its operation is prospective only.

STATUTORY CONSTRUCTION—RETROSPECTIVE EFFECT OF STATUTE—MEANING OF PROVISION THAT STATUTE SHALL BE EFFECTIVE "DURING THE PERIOD OF THE NATIONAL EMERGENCY PROCLAIMED BY THE PRESIDENT MAY 27, 1941."

The provision in the act of December 24, 1942, that it shall be effective "during the period of the national emergency proclaimed by the President May 27, 1941," is not an unequivocal expression of the legislative intent that the statute shall be effective from and after May 27, 1941.

STATUTORY CONSTRUCTION—RELIEF STATUTE.

The rule that a relief statute should be liberally construed to include all those whom it was intended to benefit has no application to the act of December 24, 1942, which offers a bounty in the form of a reduced royalty rate for oil and gas prospecting on the public domain resulting in the discovery of a new field or deposit. Persons who do not discover oil as a result of prospecting which would not have been done except for the reward offered by the act of December 24, 1942, are not entitled to its benefits.

DISCOVERY OF NEW OIL FIELD—TIME OF DISCOVERY—EFFECT OF PRODUCTION OF OIL PRIOR TO ALLEGED DISCOVERY DATE.

The development of a well which produced an average of 226 barrels of oil and 328 barrels of water per day from and after October 25, 1942, cannot be regarded as a discovery of a new oil field after December 24, 1942.

CHAPMAN, *Assistant Secretary*:

The unit operator and the lessees of certain lands in Laramie County, Wyoming, within an area included in the approved unit plan of development for the Horse Creek Anticline Area have appealed from the decision of the Commissioner of the General Land Office of May 22, 1943, denying their petition for determination that a discovery of a new oil and gas field has been made which entitles them to the benefits of the act of December 24, 1942.

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The four leases held by appellants were issued on August 1, 1942, and November 1, 1942. On January 8, 1943, all or a portion of the land covered by each of these leases was included in the Horse Creek Anticline Area and the General Petroleum Corporation of California was approved as the unit operator. In September and October 1942, a producing well was developed on the land covered by the Saltgaver lease. On January 22, 1943, the lessees and the unit operator filed their petition, requesting the Secretary of the Interior to determine that a new oil and gas field and deposit embracing all the lands within the unit area described as the Horse Creek Anticline Area has been discovered and that from and after October 25, 1942, the royalty on the oil production under each of the leases shall be at a flat rate of $12\frac{1}{2}$ percent in accordance with the provisions of the act of December 24, 1942 (56 Stat. 1080).

In his decision of May 22, 1943, the Commissioner denied the petition on the ground that the act of December 24, 1942, is applicable only to discoveries made after its enactment. This appeal raises only the question of the date of the effectiveness of the statute.

The act of December 24, 1942, entitled "An Act To encourage the discovery of oil and gas on the public domain during the continuance of the present war," provides:

That, during the period of the national emergency proclaimed by the President May 27, 1941 (Proclamation Numbered 2487), upon a determination by the Secretary of the Interior that a new oil or gas field or deposit has been discovered by virtue of a well or wells drilled within the boundaries of any lease issued pursuant to the provisions of the Act, approved February 25, 1920, as amended (U. S. C., title 30, secs. 181-263), the royalty obligation of the lessee who drills such well or wells to the United States as to such new deposit shall be limited for a period of ten years following the date of such discovery to a flat rate of $12\frac{1}{2}$ per centum in amount or value of all oil or gas produced from the lease.

It is a matter of common knowledge that in 1942, serious concern was felt for the consequences of the greatly increased oil production demanded by the war program of the United States. In seeking to augment the sources of oil in order to prevent depletion of existing sources through overproduction, Congress adopted the policy of encouraging exploration on the public domain and, to accomplish that end, enacted the act of December 24, 1942, which offers a bounty for discoveries of new fields or deposits of oil and gas on the public domain in the form of a lower royalty rate.

In urging that the act of December 24, 1942, was intended to operate retrospectively so that it is applicable to the discovery of October 25, 1942, appellants do not deny the well-established rule that a

statute cannot be construed to operate retrospectively unless the legislative intention to that effect is unequivocally expressed. *Brewster v. Gage*, 280 U. S. 327, 337; *Miller v. United States*, 294 U. S. 435, 439. They contend, however, that the phrase, "during the period of the national emergency proclaimed by the President May 27, 1941," contained in this statute can be interpreted only as a legislative direction that the privilege of paying the lower royalty rate shall be extended to the lessees of lands upon which new discoveries have been made at any time since May 27, 1941.

There is, in fact, no express direction in the statute which indicates when it shall become effective. Likewise, there is no designation of a date when it shall cease to be effective. It is obvious, however, from its terms that the statute was intended to terminate with the period of the national emergency. In indicating that its effectiveness should end with the end of the national emergency it was both natural and necessary to refer to the Presidential proclamation that gave the existent emergency a legal status. In doing so, it was necessary to identify the proclamation by its date and number. Thus it is reasonable to suppose that in referring to the proclamation as it did that Congress did not intend that the privilege extended by the statute should apply from the date of the proclamation, but that it should apply to all new leases issued by the Department after the effective date of the act and until such time as the existence of a national emergency is no longer recognized.

This interpretation is at least as plausible as the interpretation suggested by appellants. Because the statute is subject to such interpretation it is clear that there is no unequivocal expression of the legislative intention that it shall operate retrospectively. A statute is not retroactive merely because it draws upon antecedent facts for its operation. *Cox v. Hart*, 260 U. S. 427, 435; *Reynolds v. United States*, 292 U. S. 443, 449; *Lewis v. Fidelity & Deposit Co., of Maryland*, 292 U. S. 559, 571; *Russell v. United States*, 278 U. S. 181, 187, 188.

Appellants also contend that because Senator O'Mahoney of Wyoming is the author of the act of December 24, 1942, his letter to the Secretary of the Interior pleading for a retrospective operation is evidence that the act was intended to authorize such operation. The principle of statutory construction implicit in this contention might be conceded without altering the position of the Department, since the bill actually enacted is a substitute for Senator O'Mahoney's bill which was offered by the Secretary of the Interior (H. Rept. 2730, 77th Cong., 2nd sess.), and was drafted in this Department. The Secretary's letter of May 3, 1943, in answer to Senator O'Mahoney,

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and the applicable departmental regulations approved on the same date (8 F. R. 6141), both of which adopted the construction opposite to that urged by the appellants, are thus, under appellants' theory of statutory construction, cogent evidence of the purpose of the statute.

In his letter of May 3, 1943, the Secretary informed Senator O'Mahoney that the Department was clearly of the opinion that the act could not be construed as retrospective in effect.

Subparagraph 2 of section 192.56b of the regulations states:

The Act does not apply to discoveries made prior to its enactment or to discoveries on leases carrying a royalty of less than 12½ percent.

Appellants also contend that because the statute is a relief statute it should be liberally construed to benefit all those to whom it is applicable. It is clear, however, that the statute in question is not a relief statute. It is rather the offer of a reward for oil prospecting on the public domain which results in the discovery of additional sources of the national oil supply. It was intended to encourage extensive prospecting in regions of the public domain where oil and gas are not known to exist and offered the lower royalty rate on new discoveries in such regions as an incentive for such prospecting. The report of the Senate Committee on Public Lands and Surveys (S. Rept. 1652, 77th Cong., 2nd sess.) states specifically: "It is purely designed to be an encouragement for wildcatting."

Because the result of this act is a temporary reversal of the firmly established conservation policy of the Department and a reduction in the revenue realized from oil and gas leases, it is apparent that it was not intended that the act should be utilized for the personal benefit of individuals who do not meet the conditions upon which the statutory bounty is given. Appellants were not motivated by the reward which the statute offers to undertake any additional drilling on the public domain. They had completed drilling and were operating a producing well several months before the act was passed by Congress. They did not, therefore, augment the sources of the nation's supply of oil by the discovery of oil on land which they would not have prospected except for the reward offered by the statute and they are not entitled to the benefits of the act.

Appellants' final contention that in the event that the Department should determine that the statute has no retroactive operation, it should recognize that the discovery upon which they rely was not made until after the enactment of the act of December 24, 1942, is without merit. It is completely refuted by the factual information contained in their own petition which shows clearly that the well has

been producing an average of 226 barrels of oil and 328 barrels of water per day since October 25, 1942.

The request for oral argument is denied and the decision of the Commissioner is affirmed.

Affirmed.

H. W. ROWLEY

Decided November 22, 1943

PRACTICE—RES JUDICATA.

A decision in a patent proceeding that the land is coal in character is res judicata and will not be disturbed in an action initiated by protest against issuance of oil and gas leases unless clearly proved to be wrong.

PRACTICE—PROCEDURE OF REOPENING A CASE CLOSED BY DEPARTMENTAL DECISION
—AUTHORITY OF COMMISSIONER TO DISREGARD DEPARTMENTAL DECISION.

A party aggrieved by final decision of the Department may reopen the case by motion for exercise of supervisory authority of the Secretary under Rules of Practice (Rule No. 85, 43 CFR 221.82), but the Commissioner of the General Land Office is without authority to disregard a departmental decision.

CLASSIFICATION—EFFECT OF RECOGNITION OF CLAIMS TO OIL AND GAS AFTER
CLASSIFICATION OF LAND AS VALUABLE FOR COAL.

When land has been classified as valuable for coal and withdrawn from entry, selection or location for other purposes, the discovery of oil and the issuance of leases do not affect the withdrawal for coal purposes or constitute a finding that the land has no value for coal.

CHAPMAN, *Assistant Secretary*:

January 23, 1926, H. W. Rowley filed application, Billings 027490, for patent to the Hillside Oil Placer claim showing location thereof December 1, 1915. The location covered the greater part of the SE $\frac{1}{4}$ and a small strip in the E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 34, T. 9 S., R. 23 E., M. P. M. At the date of location all the land therein was classified and priced as coal land except NE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 34 in accordance with the provisions of paragraph 6 of the regulations under the coal land laws approved April 12, 1907 (35 L. D. 665), and instructions approved April 10, 1909 (37 L. D. 653). On April 1, 1927, the E $\frac{1}{2}$ of lot 4 (SE $\frac{1}{4}$ SE $\frac{1}{4}$) was reclassified as noncoal. By Executive Order of December 6, 1915, all of Sec. 34 was included in Petroleum Reserve No. 40, Montana No. 1, and on December 16, 1924, defined as within the known geologic structure of the Elk Basin oil and gas field. By decision of November 3, 1927, the Commissioner of the General Land Office found that discovery of oil had been made in a well on the claim in June 1917 at the depth of about 2,000 feet, as the result of diligent

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prosecution of work initiated prior to the inclusion of the land in the petroleum reserve and also in a second well in 1922; that the wells were located on the area classified as noncoal and that the average production per well was 5 barrels per day. The Commissioner, in effect, held that lands classified as coal land and valuable therefor were not subject to mining location; that the classification was *prima facie* evidence of such value, and upon condition that the applicant complete his record as to other particulars he was allowed to apply for a hearing—

* * * to show, if he can, the non-coal character of each or any of the 40-acre subdivisions part of which is embraced in his claim and which is now classified as coal, or of any area or areas within the boundaries of his survey contiguous to the lands therein now classified as non-coal, the claimant being entitled to all of the land in his claim which is not coal in character. (See 51 L. D. 436)

The applicant applied for a hearing and adduced his evidence in disproof of coal classification in March 1931. In behalf of the Government, the testimony of mining engineer Galbraith on direct and cross-examination was taken by deposition in May 1931.

By decision of June 6, 1932, the Department upon appeal of the applicant sustained the concurrent findings of the register and Commissioner, made upon consideration of the evidence adduced, that all the land then classified as coal, namely, all that part of the claim except what is within the NE $\frac{1}{4}$ SE $\frac{1}{4}$ and E $\frac{1}{2}$ SE $\frac{1}{4}$ SE $\frac{1}{4}$ is valuable for coal and affirmed the rejection of the application to the extent of the land so classified. July 25, 1932, in accordance with this decision, the Commissioner finally rejected the application to the extent of its conflict with Lot 2, NE $\frac{1}{4}$, SW $\frac{1}{4}$, Lot 3, NW $\frac{1}{4}$ SE $\frac{1}{4}$, W $\frac{1}{2}$ Lot 4, Sec. 34 and closed the case. The applicant having died in the meantime, the application for the reduced area was caused to be perfected by the executors of his estate, the purchase price for the excess area was returned to the applicant's representatives and patent issued February 21, 1933, for the area within the claim classified as noncoal embracing 35.574 acres.

Based upon an application filed April 18, 1932, for the lands eliminated from the mineral application, an oil and gas prospecting permit for such land was issued on December 18, 1933, to Theodore E. Keefer which was canceled June 11, 1937. On July 22, 1943, the Minnelusa Oil Corporation completed a commercial well on the tract patented to Rowley in the Embar Tensleep sands at a depth of about 4,900 feet. A report made by oil and gas supervisor to the Geological Survey is to the effect that the well has an estimated open flow of 1,920 barrels of oil a day. Upon a supplemental plat of survey the W $\frac{1}{2}$ Lot 4

is designated as Lot 8. Public sale of this lot, among other parcels of land, was authorized June 18, 1943, under section 17 of the General Leasing Act, as amended, and advertised to be sold on August 12, 1943.

July 16, Wood and Cooke, the attorneys who had represented Rowley in connection with the patent application, addressed a letter to the Commissioner protesting against the sale of Lot 8 by the Government and expressing the view that the patent proceeding should be reopened and patent be issued for Lot 8. The reasons advanced for the action proposed were, in substance, that the applicant could not have applied for an oil and gas permit for the area excluded from the patent as he could not truthfully state that the land was not within the known geologic structure of an oil and gas field and after the leasing act was amended August 21, 1935, such an application would have been rejected; that of the area excluded only Lot 8 remained unappropriated land, the remainder being embraced in oil and gas leases; that the testimony at the hearing showed that the land had no commercial value for coal and was more valuable for oil than for coal and that the Government had recognized by its subsequent action that the land had only value for oil and that it should be treated as oil land and the decision therefore holding the land valuable for coal should be treated as void. By decision of August 2, 1943, the Commissioner dismissed the protest on the ground that the matter was *res judicata* and he was without jurisdiction. The applicant has appealed alleging that it affirmatively appears from the record and proceedings relating to Hillside Placer claim that—

1. That there is no evidence nor any sufficient or substantial evidence establishing or tending to establish that the land now described as Lot 8, Section 34, Township 23 South, Range 9 East, Carbon County, Montana, at the time of the location thereof by H. W. Rowley, or thereafter or at all, was coal in character but that on the contrary it is established by the said record without dispute that the said Lot 8 was non-coal in character at such time and times and was properly located by the said H. W. Rowley as a portion of his placer mining claim.

2. That the rejection of the application of H. W. Rowley for patent upon said Lot 8 was void, without support in the record of the case and contrary to the said record, for the reasons specified in paragraph 1 of this notice of appeal, and that accordingly the case in that respect is not *res judicata*.

3. That the decision rejecting the application for patent upon said Lot 8 is a void judgment rendered without jurisdiction in the premises in that there is no evidence nor any sufficient or substantial evidence to support the same in the said record, and that accordingly the said judgment was properly subject to the attack made upon it through the proceedings involved upon this appeal.

And it is hereby specified as a further ground for this appeal that the Department of Interior has long disregarded the designation of said Lot 8 upon its

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records as land that is coal in character and has likewise disregarded the similar designation upon its records of other adjoining and adjacent lands, some of which were included in the patent application of H. W. Rowley and rejected for patent as coal and not oil lands, and has treated the said Lot and other lands for all purposes as oil lands and not otherwise, all of which appears from the records and files of said Department, which are made a part hereof by reference.

No rule is more settled than the rule that the Commissioner has no authority to overturn the decision of the Department and his holding that he had no jurisdiction was clearly right. *Lettrious Alrio*, 5 L. D. 613; *Phillips v. R. R.*, 6 L. D. 378; *J. H. Kopperud*, 10 L. D. 93; *John Woods*, 10 L. D. 230; *Clark I. Wyman, Assignee*, 55 L. D. 107; *John T. Naff*, 11 L. D. 174. The appellants do not assign any error in the grounds for dismissing his protest and as an appeal it may well be dismissed. The proper procedure to secure the reopening of a case closed by final decision of the Department is by a motion for the exercise of supervisory authority under Rule 85 of Practice, 43 CFR 221.82. As the appellants, in effect, question the status of the tract as public land and the right to administer it under the leasing act and claim in their argument that under the law no lease can be granted by the Department because of the vested rights of Rowley in the land by virtue of his mining location and application for patent, the contentions of the appellants will be regarded as in support of a motion for the exercise of supervisory authority.

Assuming for the sake of argument as asserted, that the conclusion that the land was valuable for coal was unsupported by sufficient or substantial evidence, the contention that the decisions were therefore void and the Department without jurisdiction is opposed to settled law. It is an established principle that lands withdrawn and classified as coal land and valuable therefor are not subject to location, entry and patent under the mining laws for nonmetallic mineral. *Arthur K. Lee et al.*, 51 L. D. 119; *John McFayden*, 51 L. D. 436, 438. The validity of Hillside Oil Placer as to the tracts involved turned on the question of fact whether the land was valuable for coal. The decisions assailed held that it was so valuable. The determination of the Land Department as to the existence of facts upon which the right to a patent is based is conclusive against collateral attack in the absence of fraud or mistake. *Steel v. Smelting Co.*, 106 U. S. 447; *Barden v. Northern Pac. R. Co.*, 154 U. S. 288; *West v. Standard Oil Co.*, 278 U. S. 200, 211; *Lindley on Mines* (3d ed.) sec. 108; 43 U. S. C. A. sec. 2 and notes 37, 38 and 39. And this determination would ordinarily be conclusive, even if wrong conclusions were drawn from the evidence, *Shepley v. Cowan*, 91 U. S. 330, 340; *Lee v. John-*

son, 116 U. S. 48, 49, and there was demonstrable error in the admission, or appreciation of the evidence, *West v. Standard Oil Co.*, *supra*, 213.

Moreover, the fact that the land may be, or is demonstrated to be, more valuable for oil than for coal, whether known now or at the time of adjudication does not militate against the force of the withdrawal and classification for coal. The relative value of the land for coal and for petroleum affords no adequate basis for a determination of the right of the applicant to a patent for an oil placer claim. *John McFayden et al.*, *supra*, 440-442. Land may still be valuable for coal although it may have a far greater present value for oil. Moreover, the fact that the Department has granted oil and gas permits and leases on the land and intends to grant further rights to such deposits, does not imply a judgment that the land has no value for coal nor affect the withdrawal therefor. The appellants have not shown any error of law in the decisions made and the findings of fact are not open to attack, and there is nothing therefore to create a doubt as to its validity.

The appellants reproduce a large part of the evidence of the mineral claimant and attempt to assay the value of the testimony of the Government in support of their contention that the evidence affirmatively shows that the coal veins on the land have no merchantable value and are worthless. The record shows that these same contentions were made on the former appeal to the Department and were the chief grounds relied upon for reversal. The undisputed evidence shows that the coal crop line extends irregularly through lot 8, alleged to contain 20.64 acres and there is no coal east of the crop line. As to the land west of the crop line there was a conflict of expert opinion from surface observation whether coal commercially valuable existed at depth. The witnesses for the mineral claimant were of the opinion that the coal was worthless, the principle reasons assigned being that there was a strata of disintegrated shale above the coal vein and if attempt was made to recover the coal, the shale would intermingle with it and it would be impracticable to separate it from the coal; that the coal bed that otherwise would be minable was above the saturation point or water level and that surface moisture had the effect of leaching out the volatile matter and causing the coal to check in its laminations, lose its heat value and open up and receive a great deal of foreign matter; that the erosion was at right angles to the dip of the coal and the coal would therefore be difficult to mine; that the coal was a medium lignite, dirty and of poor quality.

Galbraith, a mining engineer, on the other hand, was of the opinion that prospecting would be necessary to determine the heat value;

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that the outcrop indicated a good grade of hard semibituminous coal when mined at depth, the same as had been encountered in the Silver Tip mine in the same Eagle formation two miles distant from the land; that it would be the same coal as was mined at Bridger, Montana, in the same series having 11,000 B. t. u. when analyzed; that there was no demand for the coal at the present time, but if there were, it could easily be mined and transported; that the crop coal was above the water level but after depth is reached the surface leaching would disappear and the coal would be found of good quality; that because of the loose shale and top soil the mine would have to be timbered but when the weathered horizon was passed the coal would be hard again. The testimony of Galbraith shows that while he introduced data appearing in Bulletin 341 of the Geological Survey, upon which the classification was based relating to the analysis of the Eagle coal and other matters, that he measured the outcrop, examined the land, and made maps of the significant coal features. There is no basis in fact for the statement of appellants that he but reiterated the facts in the Survey Bulletin. The above-stated outline of the nature of the testimony is not made with any purpose to readjudicate the facts, but to show that the adjudication was based upon conflicting opinion evidence and that the appellants here seek a readjudication after acquiescing in the previous final decision for 12 years and accepting the patent without demur. As to that portion of lot 8 which appeared from the evidence to be noncoal in character, the patentees made no timely objection to its exclusion from the patent. Contrary to what may be implied from the decision of the Commissioner, the decision in *John McFayden et al.*, *supra*, did not hold that a placer patentee was entitled to every 2½-acre tract nonmineral within his location. The classification in that case was made according to 2½-acre tracts as stated "for the purpose of this case only" and purely as a matter of grace and not of right. The smallest legal subdivision authorized by Rev. Stat. sec. 2330, to which a placer claim on surveyed land may be located and described are 10-acre tracts in square form. *William J. Harris*, 45 L. D. 174; *Laughing Water Placer*, 34 L. D. 56; *Roman Placer Mining Claim*, 34 L. D. 260; *American Smelting and Refining Co.*, 39 L. D. 299. Departures from this rule have been recognized where the status of surrounding land did not permit conformity therewith, as where compliance with the requirement would necessitate the placing of the lines upon prior located claims or the claim located was surrounded by such claims. *Snow Flake Fraction Placer*, 37 L. D. 250. The noncoal portion of section 8 is not susceptible of division

in squares of 10 acres, and the patent applicant was not deprived of any right by the rejection of his application as to such portion.

Although the Department is not controlled in its decisions by the doctrine of *res judicata* and may open any proceeding and correct and reverse its decision so long as the legal title to the land involved remains in the Government, *United States v. United States Borax Company*, 58 I. D. 426, *supra*, the Department has frequently recognized and applied the doctrine as essential to the orderly administration of the laws of the United States by its executive officers, *Lillie M. Kelly*, 49 L. D. 659; *Charles Perkins*, 50 L. D. 172, and whenever necessary to protect the rights of the Government and where equity and justice demand it, *Brooks v. McBride*, 35 L. D. 441. It has frequently been applied where errors of fact were alleged after long acquiescence in decisions of the Department, but no new facts were alleged, as in *Daniel Woodson and J. W. Whitfield*, 3 L. D. 364; *A. T. Lamphere*, 8 L. D. 134. The question whether the land in controversy was valuable for coal was necessarily resolved by weighing conflicting geological inferences, and it does not appear that then or now, the conclusion that the land was valuable for coal was clearly wrong. Had a motion for rehearing been timely filed upon the same grounds as now advanced, the rule would have been applicable that the concurring decisions below upon the facts are not to be disturbed unless clearly wrong, *Coffin v. Inderstrodtt*, 16 L. D. 382, and that the motion should not be entertained unless it presented some vital and controlling question that was not considered when the decision was prepared. *Cobb v. Crowther et al.*, 46 L. D. 473. The record does not show that by the decisions assailed the mineral claimant was denied any valid right, but had it so appeared, the Government, through the partial rejection of the application reasserted its title to the land rejected and resumed control of it for a much longer period than the statute of limitations of the State (secs. 9015, 9016, Rev. Code, Mont., 1935) provides, and which may be relied upon in adverse proceedings to quiet title to real property. See *Leutholtz v. Hotchkiss*, 259 Pac. 1117; Instructions of February 6, 1941, *Farmers Banco*, 57 I. D. 236. The case is regarded as finally adjudicated. Fully cognizant of this protest, the Department on October 25, 1943, approved the recommendations of the Commissioner that the lot in question, with others, be advertised for lease under the provisions of section 17 of the leasing act and notice has been issued for the reception of bids until noon of November 29, 1943. Upon full consideration of the matter that action is affirmed and the motion finally

Denied.

EARL CRECELOUIS HALL

Decided November 30, 1943

TRANSPORTATION ACT OF 1940—RESTORED LANDS—WHEN AVAILABLE FOR DISPOSAL—TAYLOR GRAZING ACT—SETTLEMENT.

Lands released under the Transportation Act of 1940 are "restored" lands, which are available neither for disposal nor for classification until appropriate indication of such availability shall have been given by the Government and notation of restoration shall have been made on the records.

Action looking to the disposal of such lands will not be taken pending congressional action on legislation recommended by the Department to fix their status.

By virtue of the Taylor Grazing Act of 1934, rights of settlement may no longer be initiated.

CHAPMAN, Assistant Secretary:

Earl Crecelouis Hall of Auburn, California, has appealed from a decision by the Assistant Commissioner of the General Land Office dated June 8, 1943. This held for rejection Sacramento 034868 "F". Hall's application of December 15, 1942, for homestead entry under Rev. Stat. sec. 2289 and his petition under the Taylor Grazing Act¹ for an agricultural classification of 80 acres located outside a grazing district and described as follows: T. 14 N., R. 8 E., M. D. M., California, Sec. 9, W $\frac{1}{2}$ SE $\frac{1}{4}$, or NW $\frac{1}{4}$ SE $\frac{1}{4}$ and SW $\frac{1}{4}$ SE $\frac{1}{4}$.

The petition for classification shows that despite the prohibition in section 7 of the Taylor Grazing Act against the occupation of public lands in advance of allowance of entry Hall took possession of the lands on October 30, 1940, two years before applying for them, that with his wife and two minor children he has been residing on them ever since and that he has made a number of improvements on them. The petition states that Hall believed the lands belonged to Dorin C. Van Lue and tried to buy them from him. Informed that they were owned by the Central Pacific Railway Company, he approached the company only to learn that the railroad had released all its claims to these tracts. He therefore filed a homestead application for them and petitioned for their agricultural classification, stating that the two tracts are essentially nonmineral and are not being claimed or worked for mineral.

Briefly, the ground assigned for the Commissioner's rejection was that the lands sought were among lands claims to which by land grant carriers had been released under the Transportation Act of

¹ Act of June 28, 1934 (48 Stat. 1269), as amended by the act of June 26, 1936 (49 Stat. 1976, 43 U. S. C. sec. 315f); 43 CFR 296.1-296.13.

1940; that H. R. 838 had been introduced into the House on January 7, 1943, to provide an administrative policy for all such lands; and that pending congressional action thereon the lands involved were not subject to disposal and petitions for their classification need not be considered. The decision also suggested that Hall's occupancy of the lands was a trespass.

Hall appealed, indicting the decision as a violation of constitutional law and an arbitrary denial of his right to be heard, in contradiction of all land office precedents. He resented being thought a trespasser. He considered himself a "settler" and as such protected by various statutes. He demanded action upon his application without reference to any pending congressional legislation.

The connection of the Central Pacific Railway Company with the lands here sought is of controlling importance. It was described in part in the Commissioner's decision. The chief points in the legal relation of the road to the lands are as follows: The tracts in question had been within the odd section railroad grant made by the acts of July 1, 1862 (12 Stat. 489), and July 2, 1864 (13 Stat. 356), a grant *in praesenti* of lands in primary limits only to which the Central Pacific Railway Company had succeeded. By letters of August 2, 1862, and August 9, 1864, the township here involved, namely, T. 14 N., R. 8 E., M. D. M., was withdrawn for the railroad to the 15 and the 25 mile limits, respectively. On March 26, 1864, the company filed the map of definite location of the railroad's line opposite these tracts.

As to the particular subdivisions here involved, it was not until February 19, 1938, that the company filed its selection of them, namely, List No. 115, Sacramento 031414, declaring that the tracts were not "interdicted mineral" lands or adversely appropriated. However, upon field examination of the tracts for minerals, the special agent on August 10, 1938, reported that the land was essentially mineral in character, containing valuable deposits of gold and other minerals; that it was being mined by several persons, among them Dorin C. Van Lue, mentioned above; and that it was not subject to patent by the railroad.

In consequence, the land office on August 27, 1938, directed adverse proceedings, Contest 2471, against the selection on the agent's charge. The record upon the hearing, Sacramento 031414, showed that Van Lue alleged ownership of several mining claims located in 1936 on the acreage involved, viz., W $\frac{1}{2}$ SE $\frac{1}{4}$ of Sec. 9. On March 12, 1940, the register held the charge proved and recommended cancellation of the selection list. On April 12, 1940, the company appealed. Events however made it unnecessary for the Department to decide

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between the examiner and the register on the one hand and the railroad on the other. Further, as will be seen, the same events make it unnecessary and improper at this time to consider the character of the NW $\frac{1}{4}$ SE $\frac{1}{4}$ in connection with Hall's application.

Before departmental consideration of the railroad's appeal, the Congress passed the Transportation Act of September 18, 1940 (54 Stat. 954). Of this act, section 321(a), part II, Title III (49 U. S. C. sec. 65) provided for the elimination of preferential traffic rates enjoyed by the United States in connection with certain of its railroad transportation requirements. But part (b) of the section required that before becoming entitled to the benefits of section 321(a) a land-grant railroad carrier must release all "further claims" to lands under its grant. To avail itself of the benefits mentioned, the Central Pacific Railway Company on October 28, 1940, conformably with land office regulations² filed the required release of all its "further" claims under its grant and on December 28, 1940, the Secretary approved the release, in effect thereby lifting the above-described withdrawals of the lands released.

Under the Transportation Act, lands embraced in clear lists fully and finally approved by the Secretary of the Interior to such extent that issuance of patent thereof might be required by law were among those lands which were to be excepted from the scope of a release. In this case, the railroad's selection of W $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 9 had not been thus finally approved by the Secretary. It was therefore not excepted from the release but was one of the "further claims" which the railroad gave up by its formal release. With the execution of the release the occasion for the contest and for the company's appeal ceased. The company had dropped its claim. Accordingly, on November 6, 1942, the General Land Office canceled the selection in List 115 and dismissed and closed Contest 2471, without acting on the company's appeal in the adverse proceedings. That this action was proper is not to be questioned.

The intention and the effect of the release were of course to free from any company claim all the United States lands that had been subject thereto. Upon the Secretary's approval of the instrument the two withdrawals mentioned above as made for the road were in effect lifted and the lands, released from all claims, immediately regained the status of vacant, unappropriated, public lands. But this restoration of the tracts to the public domain did not *eo instanti* make them subject to classification and disposal under section 7 of the Taylor Grazing Act as some might suppose.

² Regulations of October 10, 1940, Circ. 1480, 43 CFR 273.61-273.67.

The simple fact that lands belong to the United States and make part of the public domain does not of itself make them subject to disposal and private acquisition. Something more is required. It is true that according to the Supreme Court³ the words "public lands" are habitually used in our legislation to describe such lands as are subject to sale or other disposal under general laws; and that ordinary thinking gives only this narrow, technical sense to the term. But it is not to be overlooked that the Supreme Court has also said that before lands federally owned become subject to private appropriation there must be an indication by the United States that the lands are held for such disposal.⁴

This latter statement, made in 1898, epitomized land department views and practice, in particular as to "restored" lands. Through the years, the Office and the Department have had frequent occasion to consider the status of restored lands,—lands once segregated by various kinds of adverse claims or appropriations, even those of patent, and restored to the United States by congressional act, by court decision, by individual relinquishment, by land office cancellation or by revocation of some withdrawal, Executive or departmental. In a long line of decisions in such cases, the Department has held that although restored lands become part of the public domain immediately, it remains for the Department and for it alone in the absence of congressional direction to give the "indication" spoken of by the court and to determine when and how such lands shall be opened for disposal.⁵

Not only this. The Department has also held that orderly administration of the land laws forbids any departure from the salutary rule that lands which have once been segregated from the public domain, whether by entry, patent, reservation, selection or otherwise, shall not be subject to any form of appropriation until the local land officers, acting under instructions from the Commissioner of the General Land Office, shall have entered upon the records of the local office proper notation of the restoration of the lands to the public domain.⁶

³ *Newhall v. Sanger*, 92 U. S. 761.

⁴ *Oklahoma v. Texas*, 258 U. S. 574, 600.

⁵ *Olson v. Traver*, 26 L. D. 350, 354, 355 (March 10, 1898); *Smith v. Malone*, 18 L. D. 482, 483, and the *Omaha Railway* cases therein cited; *Charles H. Moore*, 27 L. D. 481, 493; *State of Utah*, 53 L. D. 365, 367; *Asst. Attorney General's Opinion* of September 14, 1904, 33 L. D. 236.

⁶ *Gunderson v. N. P. Ry. Co.*, 37 L. D. 115; *Holt v. Murphy*, 207 U. S. 407, 415; *Germania Iron Co. v. James*, 89 Fed. 811; *Hiram M. Hamilton*, 38 L. D. 597; *California and Oregon Land Co. v. Hulen and Hunnicutt*, 46 L. D. 55; *Lewis G. Norton* (On Rehearing), 48 L. D. 507.

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Such notation continues to be a condition precedent to the disposal of restored lands. But since passage of the Taylor Grazing Act on June 28, 1934, it no longer renders them subject to settlement; for section 7 of the act forbids settlement of the public lands before allowance of entry. Nor does such notation make the restored lands immediately available for entry; for section 7 of the Taylor Act, again intervening, requires appropriate classification of desired lands before entry may be allowed. Hence today notation of a restoration on the records renders lands subject not to entry but only to classification for some form of entry. In the instant case the lands are not yet available for either disposal or classification; for the land office has not yet ordered that their restoration be noted on the records. Nor is it likely to do so while the bill previously mentioned, H. R. 838, is before the Congress.

For in the matter of all the railroad-claimed lands restored to the public domain by releases under the Transportation Act, the Department has felt the need of congressional assistance regarding their status and disposal. The restored lands cover approximately 8,292,523 acres⁷ or 12,957 square miles, an area equal to the combined areas of Delaware, Maryland and Rhode Island. The return of so vast an acreage to the Government within a very short period presented the Department with large and numerous administrative problems. Hence, to simplify the future status of the lands, to resolve jurisdictional uncertainties and confusions, to aid in consolidating the many checkerboarded areas in the 13 States affected and to expedite solutions the Department recommended the legislation above mentioned.

This bill, H. R. 838, provides that these lands shall be deemed a part of the public domain and also of any withdrawal or reservation within the exterior boundaries of which they or any of them respectively may be situate, subject however to any existing valid rights. Since the Congress has plenary power over disposals of the public lands, the Interior Department will take no action looking to disposal of the restored lands pending congressional consideration of these questions relating to them.⁸

In all the steps described the Land Office and the Department have acted in pursuance of statutory powers and in accordance with established precedent. They have violated no rights of appellant. In the premises he has no rights to be violated. His application has given him no rights to the land. It has not been open either to settlement

⁷ Senate Report No. 404, 78th Cong., 1st sess., July 7, 1943, Committee on Public Lands and Surveys, on "Administration and Use of Public Lands," p. 20.

⁸ *Harry Dorman*, 32 L. D. 492, 495.

or to entry. Moreover neither appellant nor any other applicant may in the future acquire homestead rights to any of these lands if they be determined to contain minerals other than those which may be reserved to the United States.

The Taylor Grazing Act having made it impossible any longer to initiate rights of settlement, it is unnecessary to consider appellant's contention that as a *settler* he has rights and that as a settler on railroad lands he is protected by the act of March 3, 1887 (24 Stat. 556, 43 U. S. C. secs. 894-899), an act which in no circumstances would be applicable to this case. Still other statements made in the appeal, likewise irrelevant, require no consideration here.

The Commissioner's decision is

Affirmed.

APPLICABILITY OF STATE SALES TAXES TO PURCHASES MADE OUT OF RESTRICTED FUNDS OF INDIVIDUAL INDIANS

Opinion, December 24, 1943

INDIVIDUAL INDIAN FUNDS—INDIAN RESERVATIONS—STATE SALES TAXES.

Where the purchases are made on Indian reservations the Indians are exempt from payment of State sales taxes because Congress has given exclusive authority to the Commissioner of Indian Affairs to regulate trade with the Indians on Indian reservations and prices at which goods shall be sold to the Indians.

Where the purchases are made outside of Indian reservations the Indians are not exempt from the payment of State sales taxes unless the restricted funds used to make the purchases have been declared by Congress to be nontaxable.

HARPER, *Solicitor*:

The Office of Indian Affairs has informally requested my opinion on the question whether purchases made by individual Indians on purchase orders issued by Indian agency superintendents and paid for out of the individual Indians' restricted accounts at the agency are subject to State sales taxes. I am informed that it has been the practice of some of the agency superintendents in issuing such purchase orders to insert thereon the words "State sales tax exempt." The Superintendent of the Taholah Indian Agency in the State of Washington, who has been inserting such a statement on purchase orders issued by him, states that his action in this respect has recently been questioned. The Office of Indian Affairs, therefore, desires to be informed whether such purchases are exempt from State sales taxes.

The answer to this question depends upon whether the sales covered by the purchase orders are made on or off an Indian reservation.

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As to Sales Made on an Indian Reservation. A similar question relating to the application of State sales taxes to sales to Indians was before this office in 1940. In an opinion approved on May 8 of that year¹ it was held that because Congress had already given exclusive authority to the Commissioner of Indian Affairs to regulate trade with the Indians on Indian reservations and the prices at which goods should be sold to the Indians,² the field was closed to State action. Therefore, sales to Indians on reservations were held not to be subject to State taxation and Indian purchasers on reservations were held not required to pay the additional cost which may be added to the price of the article to cover the tax.

Since that opinion was written Congress has waived the immunity of individuals from the payment of State sales taxes formerly existing with respect to sales made in Federal areas. By the act of October 9, 1940 (54 Stat. 1059, 4 U. S. C. secs. 12-18), Congress permitted the States to extend their sales taxes to persons residing on or carrying on business, or to transactions occurring, in Federal areas. That act, however, contains no indication of any intent on the part of Congress to interfere with the regulation by the Commissioner of Indian Affairs of trade with the Indians on Indian reservations or to burden the Indians with a tax to which they could not then legally be subjected. On the contrary, section 5 of the act declares that the permission given to the States shall not "be deemed to authorize the levy or collection of any tax on or from any Indian not otherwise taxed." While this declaration is somewhat awkwardly phrased the meaning is plain. Basic Indian immunities under the law in force prior to the enactment were not to be disturbed nor were new immunities to be created. The legality of State taxes on sales to Indians thus is to be determined not by but independently of the provisions of the act of October 9, 1940. Under this view, the opinion of May 8, 1940, is correct in so far as it holds that purchases by Indians on Indian reservations are not subject to the sales tax laws of the State.

The Indian superintendents should, accordingly, be instructed that merchandise obtained by Indians on purchase orders issued to merchants doing business on Indian reservations and paid for out of the Indians' restricted funds is not subject to State sales taxes.

As to Sales Made Outside of an Indian Reservation. The opinion of May 8, 1940, also held that when Indians purchase goods off the reservations they are not exempt from State sales taxes except with respect to special types of Indian purchases. One of these types was

¹ 57 I. D. 124.

² 25 U. S. C. secs. 261 through 266.

purchases made by Indians or Government agents for the Indians off the reservation where such purchases were made with restricted funds. Such purchases were considered to be instrumentalities of the Federal Government not subject to State taxation upon the principle that the State through the use of its taxing power could not hinder or interfere with an instrumentality of the Federal Government. The opinion was there expressed that a State tax on the acquisition of property by Federal authority placed an unconstitutional burden upon the Federal Government. *Panhandle Oil Co. v. Knox*, 277 U. S. 218, and *Graves v. Texas Co.*, 298 U. S. 393, were cited to support this position. The opinion, however, recognized that in 1940 the law with respect to what constituted an unconstitutional burden upon a Federal instrumentality was in a state of flux and recognized the tendency of the courts to restrict the tax immunity of agencies of the Federal Government where the burden on the Government was not clear and direct. The holding appeared justified in view of the then confused state of the law.

The Supreme Court has in the last few years had occasion to consider whether a State sales tax ultimately borne by a Federal instrumentality is an unconstitutional burden on the Federal Government as well as the immunity of restricted funds of Indians from State taxation. It has overruled its former decisions in both fields to such an extent that a reexamination of the question of the tax immunity of the Indians so far as purchases made off the reservation with their restricted funds are concerned must be made.

At the outset, it must be conceded that the only effect of a State sales tax on purchases made either by or for the Indians out of their restricted funds, so far as the Federal Government is concerned, might be to increase the cost to the Government of providing relief for the Indians. In other words, if the Indians' purchasing power were decreased by the addition of the State sales tax, the Government might be called upon to furnish additional services and merchandise for them. In this way the economic burden of the tax might be passed on to the United States. The Supreme Court has held that this fact does not make the tax a tax upon the United States which infringes its constitutional immunity from State taxation.

In the case of *Alabama v. King & Boozer*, 314 U. S. 1, the court in sustaining a State sales tax on goods purchased by a contractor with the United States on a "cost-plus-a-fixed-fee" contract, under which the tax, though paid by the contractor, was borne ultimately by the Federal Government, said at pages 8-9:

The Government, rightly we think, disclaims any contention that the Constitution, unaided by Congressional legislation, prohibits a tax exacted from

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the contractors merely because it is passed on economically, by the terms of the contract or otherwise, as a part of the construction cost to the Government. So far as such a nondiscriminatory state tax upon the contractor enters into the cost of the materials to the Government, that is but a normal incident of the organization within the same territory of two independent taxing sovereignties. The asserted right of the one to be free of taxation by the other does not spell immunity from paying the added costs, attributable to the taxation of those who furnish supplies to the Government and who have been granted no tax immunity. So far as a different view has prevailed, see *Panhandle Oil Co. v. Knox*, *supra*; *Graves v. Texas Co.*, *supra*, we think it no longer tenable.

The Supreme Court later in the case of *Penn Dairies v. Milk Control Commission of Pennsylvania*, 318 U. S. 261, reiterated its position that the mere fact that nondiscriminatory taxation of the contractor who furnishes supplies or renders service to the Government imposes an increased economic burden on the Government is no longer regarded as bringing the contractor within any implied immunity of the Government from State taxation or regulation. There the court said (p. 270):

The trend of our decisions is not to extend governmental immunity from state taxation and regulation beyond the national government itself and governmental functions performed by its officers and agents. We have recognized that the Constitution presupposes the continued existence of the states functioning in coordination with the national government, with authority in the states to lay taxes and to regulate their internal affairs and policy, and that state regulation like state taxation inevitably imposes some burdens on the national government of the same kind as those imposed on citizens of the United States within the state's borders, see *Metcalf & Eddy v. Mitchell*, *supra*, 523-24. And we have held that those burdens, save as Congress may act to remove them, are to be regarded as the normal incidents of the operation within the same territory of a dual system of government, and that no immunity of the national government from such burdens is to be implied from the Constitution which established the system, see *Graves v. New York ex rel. O'Keefe*, 306 U. S. 466, 483, 487.

Compare *Pacific Coast Dairy, Inc. v. Department of Agriculture of California*, 318 U. S. 285, where the court held that the State's attempt to revoke the license of a milk dealer for selling milk to the War Department at less than the minimum price fixed by State law, where the sales and deliveries were made at a place within the exclusive jurisdiction of the United States, was unconstitutional. The court in that case said:

We have this day held in *Penn Dairies v. Milk Control Commission*, *ante*, p. 261, that a different decision is required where the contract and the sales occur within a state's jurisdiction, absent specific national legislation excluding the operation of the state's regulatory laws. The conclusions may seem contradictory; but in preserving the balance between national and state power,

seemingly inconsequential differences often require diverse results. This must be so, if we are to accord to various provisions of fundamental law their natural effect in the circumstances disclosed. So to do is not to make subtle or technical distinctions or to deal in legal refinements. Here we are bound to respect the relevant constitutional provision with respect to the exclusive power of Congress over federal lands.

The logical deduction from these decisions is that if the Federal Government itself is not immune from the direct burden imposed by the increased cost of goods purchased on its behalf within the State's jurisdiction, its Indian wards certainly may not claim immunity unless they have been granted the immunity by act of Congress. "Wardship with limited power over his property does not, without more, render him [the Indian] immune from the common burden." *Superintendent v. Commissioner*, 295 U. S. 418, 421.

Until recently it has been the position of this Department that restriction against alienation of the funds of the Indians implied immunity from State taxation. In the case of *Oklahoma Tax Commission v. United States*, 319 U. S. 598, decided June 14, 1943, the Court had before it the question of whether funds restricted by act of Congress were immune from State estate taxes. One of the arguments advanced by the Government on behalf of the immunity of such funds was that Congress by placing restrictions upon the funds manifested a purpose to exempt them from State taxes. The Court found that restriction against alienation, without more, was not the equivalent of a congressional grant of tax immunity. It pointed out that the doctrine of constitutional immunity from taxation for the income of the Indians' holdings on the Federal instrumentality theory had been renounced in *Helvering v. Mountain Producers' Corp.*, 303 U. S. 376, and that the immunity formerly said to rest on constitutional implication could not now be resurrected in the form of statutory implication. The Court then considered the act by which the particular funds there in question were restricted and found nothing in that act suggesting that Congress meant to exempt such restricted funds from State taxation. The Court pointed out further that when Congress wants to require both nonalienability and nontaxability it can, as it so often has done, say so explicitly.

While it is true that the taxes considered in that case were estate taxes levied by the State of Oklahoma on the transfer of estates of deceased members of the Five Civilized Tribes and while the court found that the Indians of the Five Civilized Tribes have no tribal autonomy, such as exists on other reservations, and that there is little to distinguish them from other citizens of the State, yet it must be recognized that the court did hold that restrictions, without more,

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are not enough to remove Indian funds from the sphere of State taxation.

Therefore, it must be held that unless the particular restricted funds used to make the individual purchases have been declared by Congress to be nontaxable, such funds have no immunity from State taxation when used outside of an Indian reservation. If an Indian goes off the reservation to make his purchases, such purchases may not be considered exempt from State sales taxes.

That part of the opinion of May 8, 1940, which held that purchases made by an Indian or by Government agents for an Indian with restricted funds outside of an Indian reservation were exempt from the payment of State sales taxes is overruled, and the superintendents should be instructed that merchandise obtained on purchase orders issued to merchants doing business outside of the reservation and paid for with restricted funds is subject to State sales taxes unless Congress has provided that the funds used are tax exempt.

Approved:

OSCAR L. CHAPMAN,

Assistant Secretary.

UNITED STATES v. C. E. STRAUSS ET AL.

Decided December 29, 1943

PLACER MINING CLAIMS—DISCOVERY OF VALUABLE MINERALS—DILIGENT PROSECUTION OF WORK LEADING TO DISCOVERY WITHIN MEANING OF WITHDRAWALS UNDER ACT OF JUNE 25, 1910, AND MINERAL LEASING ACT OF FEBRUARY 25, 1920.

Placer claims abandoned by original locators but claimed by appellant under purported assignment held void in absence of diligent prosecution of work leading to discovery.

OCCUPANCY OF PUBLIC LANDS.

The Department's duty to administer the public domain precludes sanction of monopolies of large areas through locations held without compliance with the law.

JURISDICTION OF DEPARTMENT TO DECLARE CLAIMS VOID.

The Department has power to declare mining claims void prior to the filing of an application for patent.

CHAPMAN, *Assistant Secretary*:

Pursuant to order of December 16, 1940, by the General Land Office, the register of the Salt Lake City office on February 18, 1941, instituted these adverse proceedings referred to as Contest 7687, to

17 placer mining claims known as Ball A, B, C, D, E, J, K, L, M, S, T, U, V, W, X, X and Y, each for a quarter section and all located in Rs. 11 and 12 E., of T. 25 S., S. L. M., Utah, in the names of C. E. Strauss *et al.*, members of the survey crew on the claims referred to hereafter, and as Contest 7688, to some 562 placer mining claims known as Ball 1 to 11, 14, 15, 18 to 56 inclusive, Pitt 1 to 20 inclusive, Boyd A, B, C, D, Fisher 1 to 40, inclusive, Curry 1 to 204 inclusive, Boyd 1 to 11 inclusive; 14 to 30, 33 to 130, 201 to 256 inclusive, Devon 2, 4 to 13, 15 to 24 inclusive, and Axel 1 to 40 inclusive, each for a quarter section and located in Ts. 25 and 26 S., Rs. 10, 11, 12, 13 and 14 E., S. L. M., Utah, in the names of H. M. Curry *et al.*, and the Duquesne Assessment Association. The contests were instituted on the grounds that no discovery of oil, gas or other minerals had been made and that claimants had not been in continuous, diligent prosecution of work leading to discovery of oil or gas so as to bring the claims within the clause in the act of June 25, 1910, saving valid mining claims made prior to the withdrawal order of March 4, 1912, and the similar clause (section 37) in the Mineral Leasing Act of 1920. The original locators, their heirs, and the Assessment Association were made parties to this contest, but because of failure of these parties in interest to take any action, the case was closed as to them by the Commissioner's decision of August 29, 1941. A. J. Denny, who since 1930 has been occupying these claims, forming a solid block of land of some 86,240 acres within Utah Grazing District No. 7, was also made a party to both of these contests. He alone answered and applied for a hearing, which was duly held January 8 and 9, 1942, at Castle Dale, Utah, before the Clerk of the District Court, and on January 29, 1942, at Salt Lake City, before the acting register. Both parties appeared with counsel. At the final hearing on January 29, it was stipulated that 37 claims (Axel 1 to 28 and 33 to 40 and Curry 67) were to be eliminated as not being claimed by Denny. However, as there was doubt about the latter claim because the description in the transcript covers Curry 66 rather than 67, and because 67 is entirely surrounded by quarter sections to which Denny asserts a right, the Commissioner in his decision of April 26, 1943, considered this claim on the merits, taking as admitted the contest to the eliminated Axel claims.

The April 26 decision sustained the following charges against the claims:

2. That minerals have not been found within the limits of the claims in sufficient quantities to constitute a valid discovery.

4. That a discovery of oil or gas or other leasable minerals was not made prior to the approval of the act of February 25, 1920 (41 Stat. 437; 30 U. S. C. 181).

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5. That the claimants were not, on February 25, 1920, in diligent prosecution of work leading to the discovery of oil or gas or other leasable minerals which was thereafter continued with diligence to discovery.

6. That a discovery of oil or gas or other leasable minerals was not made on the claims within T. 25 S., Rs. 10, 11 and 12 E., prior to March 4, 1912, when the lands were included in Petroleum Reserve No. 25.

7. That as to the claims in T. 25 S., Rs. 10, 11 and 12 E., the claimants were not, on March 4, 1912, when the lands were withdrawn, in diligent prosecution of work leading to the discovery of oil and gas, which was continued with diligence to discovery.

By letter of the Land Office dated July 2, 1943, contestee was given an extra 60 days within which to file his brief, he having filed a "Notice of Appeal" on June 7 just as the appeal time from service of the decision on May 8 was expiring.

All of these claims were located during February 1912 just prior to the March 4, 1912, withdrawal from entry of about one-third of the lands (those in T. 25 S., Rs. 10, 11 and 12 E.) as part of Petroleum Reserve No. 25. The locations were made by or on behalf of the parties as to whom this case is now closed, and the date of location and the date of discovery are the same in each instance. Approximately 150 claims each were located for building stone, for sandstone and for gypsum, about 60 for limestone, 13 for oil sand (or oil shale), and a few for manganese, aluminum and clay. Each notice after mentioning one of these minerals specifically, included the phrase "and other valuable mineral deposits."

It is conceded that the purpose of the locators was to prospect for oil and gas, which is evidenced by their group assessment work on these placer claims from 1913 through 1917. (the work being done on each five locations of 800 acres) under the provisions of the act of February 12, 1903 (32 Stat. 825, 30 U. S. C. sec. 102), allowing assessment work to be done upon any one of a group of contiguous "oil land locations, not exceeding five" rather than on individual locations. The latest year in which there is any indication of activity on these claims by or for the original locators was in 1926, and in fact it was stipulated by the parties at the hearing that the required assessment work on the 539 contested claims was done from 1913 to 1926, that for 1920 being excused by statute. The record indicates that no drilling was done after 1918.

A check of the proper public records indicates no transfer of any of these claims by the original locator. Denny has a brief written statement dated April 7, 1930, signed by Grant Curry as Secretary of the Duquesne Assessment Association to the effect that A. J. Denny is the owner of the interest of said association in said lands. This statement was not acknowledged by Curry and therefore was not

acceptable for recording, although Denny later appended an acknowledgment of his own and recorded it in July 1941. However, Curry informed the special agent who interviewed him in Pittsburgh that the consideration for the intended transfer had failed and while the parties might have quitclaimed to Denny whatever interest they had if his note to them had been paid, they no longer had any intention of doing so.

On July 1, 1931, Denny filed notice in the Emery County records where the claims are located, of having done \$100 worth of assessment work on each of the 539 claims he contests, but at the hearing he testified that he filed these notices simply because he could not record the written statement on which he relies and he wanted the county records to show that he was "the owner of these claims." When asked how much he spent in doing this assessment work—the form question in that respect being left blank—he was unwilling to say he had spent as much as \$2,000 although to satisfy the statute the worth of the work should in this case have been \$53,900. He admitted that he thought this work superfluous because title to the claims was perfected by 1920 and he was relying on the assessment work done by the Assessment Association prior to that time. He was indefinite as to when he thought discovery occurred.

Denny has been an oil-well worker and driller all his life. Since going into possession he has been using the lands involved for limited stock-raising purposes. The investigation reports indicate that he applied for a grazing license in 1937, but later refused to pay the grazing fee, taking the position that his lands were not part of the public domain. He admitted having posted "Private Property—No Trespassing" signs around the boundaries of the land which the Division of Grazing asked him to remove. He refused. His action interfered materially with grazing in Utah Grazing District No. 7, culminating in a request for an investigation by the Director of Grazing.

Careful consideration of the record leads to the following conclusions; *first*, that "valuable minerals" were not discovered on these claims at the time of location or at any time since within the meaning of sections 22 and 23 of Title 30 of the Code (Rev. Stat. 2319 and 2320), and *second*, that diligent prosecution of work on the claims leading to the discovery of oil or gas has not been continued so as to give validity to the claims under the saving clause in the act of June 25, 1910 (36 Stat. 847), pursuant to which the withdrawal of March 4, 1912, was made, and the saving clause of the subsequent Mineral Leasing Act (41 Stat. 451, 30 U. S. C. sec. 193), authorizing disposition of oil and certain other minerals by lease only.

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In effect contestee proceeds on the mistaken theory that because there is a scientific possibility that oil underlies the lands in question and because there are some indications of other minerals, including gypsum, that may be valuable at a future date—which possibilities the Government does not dispute—he, in the shoes of the former claimants upon whose rights he admittedly relies, may treat the meager evidence of minerals as a discovery, and at such future time as he is able, perfect his title and ask for a patent to the lands.

It has long been recognized that no mining rights can be acquired without discovery, and that by “discovery” is meant not mere indications, but a quantity of mineral sufficient to warrant a prudent man in making expenditures toward that end. *Cameron v United States*, 252 U. S. 450, 459 (1920); *Chrisman v. Miller*, 197 U. S. 313, 322 (1905); *United States v. Mobley* (D. C. S. D. Calif. N. D.), 45 F. Supp. 407, 409 (1942); *United States v. Standard Oil Company of California* (D. C. S. D. Calif. N. D.), 20 F. Supp. 427, 456 (1937); *Nevada Sierra Oil Company v. Home Oil Company* (C. C. S. D. Calif.), 98 Fed. 673, 676 (1899); *Oregon Basin Oil & Gas Company*, 50 L. D. 244, 252, and *H. H. Yard, et al.*, 38 L. D. 59, 70.

As stated in *United States v. Standard Oil, supra*, the Land Department for purposes of classification may recognize the known mineral character of lands without discovery, basing its determination on surrounding or external circumstances, but without discovery an individual can make no claim to the lands. See Rev. Stat. secs. 2320 and 2329 (30 U. S. C. secs. 23 and 35). If discovery occurs after acts of location have been performed, the location will date from the time of discovery. 2 Lindley on *Mines* (3d ed.) sec. 335. In this same section Lindley quotes from Halleck’s introduction to DeFooz on the “Law of Mines” as follows: “*Discovery* is made the source of title, and *development*, or working, the condition of the continuance of that act.”

There is little question here that a great deal of money was expended for work on these claims from 1913 to 1926 at the instance of the original locators, but the record indicates that this was all in the nature of prospecting work and that the discoveries claimed in the location notices were “mere *ex parte*, self-serving declarations on the part of the locators” rather than evidence of discovery. *Cole v. Ralph*, 252 U. S. 286, 303. Locators’ reference to their work as assessment work is not evidence of discovery, nor can it take the place of discovery. *Cole v. Ralph, supra*, 296; *Cochran v. Bonebrake*, 57 I. D. 105. “If controverted [discovery] must be proved independently of the recital in the certificate.” *Ainsworth Copper Company v. Bea*, 53 I. D. 382, 384.

There was testimony at the hearings as follows: Tasker, one of the men who worked on the claim in 1913 and 1914 and a son of one of the promoters of the area, testified that in the former year, holes 25 to 50 feet deep were drilled on almost all the claims, which were deepened to 75 or 100 feet the next year. Twelve-inch casings were put in these shallow holes. Mr. Whittier, a mining engineer of the Division of Investigations, testified that in the spring of 1939, he made a geological reconnaissance of the area on which trip he noted no signs of oil or oil stains on these casings. Denny himself admitted that he had no personal knowledge that "when bailing, oil appeared on the water," as he stated in his answer to charge four. This had been told him by one of the original drillers. He stated that the well now used to water his stock; one of the deeper ones drilled to 600 feet, showed oil on the water when pumped a half day or so. John Byers, one of the surveying crew, nominal locators of the Ball A to Y claims, testified that he remained there to work during the winter of 1913 and helped to drill the 50-foot wells. His testimony is of further interest in that he stated he was not paid to make the location but only to work and that he has not sold his interest in the Ball claims, but has never done any work on them as the Curry interests did the assessment work that was done.

Whittier also testified that while the San Rafael Swell to the north of the area was a large known structure and there were known anticlines or domes to the south and east, the intervening lands, including the area in question, were not favorable to the existence of oil and if oil were encountered at all, it would be at 1,000 to 1,600 feet or more; that he observed much sandstone and limestone, but no stone which could be regarded of value for building stone, and no gypsum in the area which would justify doing any work on it.

Special Agent Vander Veer, an experienced geological engineer, testified that he and Whittier made a trip together over the area two days prior to the hearing at Castle Dale. He concurred with Whittier on the unfavorable characteristics of the area for finding petroleum in any quantity and described the same regional dip referred to by Whittier, indicating no structural traps or anticlinal noses which might intervene, yielding oil. He stated that there was no seepage of oil at Buckskin Spring near this property. He also referred to the sandstone, limestone and gypsum as typical formations found throughout that part of the country.

It is clear that only shallow wells were drilled on these claims and the possibility of finding oil at much greater depth, stressed by Denny and his counsel, is not sufficient to hold the claim. A similar claim was disallowed in *Oregon Basin Oil Company, supra*, where

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the evidence showed, as here, that oil values were expected to be developed many hundred feet below the original drilling, and wholly unconnected with the formations penetrated.

As to whether a prudent man would be justified in proceeding further with these mining locations for building stone, limestone, sandstone and gypsum, Tasker stated on cross-examination that the answer depended upon whether the market would justify it. He admitted as to gypsum that he did not know whether it would have been possible to sell at a profit now or at any time since 1912. Contestee offered one Gibson as a witness, who stated he had been in the mining business for 25 or 30 years and was familiar with the gypsum-plaster mills at Nephi and Sigurd, and that if a railroad or oiled road were available to these contested claims they would be as valuable for gypsum as the deposits referred to. In this connection we might point out that there is a 1907 decision of the Supreme Court of Utah involving the gypsum deposits at Nephi, the opinion stating that "for a number of years" the parties had mined and manufactured wall plaster there. *Nephi Plaster Co. v. Juab County*, 33 Utah 114, 93 Pac. 53.

Thus the situation as to gypsum on these claims is much like that of oil. There are valuable deposits in the vicinity, but no showing in this instance that a discovery was made at the time of location or has since been made, sufficient to justify a prudent man in expending additional time or money on the claims.

Denny himself admitted that it was his understanding that there was no discovery of oil at the time of location although he took the position that other minerals were discovered then. Aside from the self-serving location notices, there is no evidence to support the latter contention. Tasker testified that an engineer employed subsequent to location refused to pass the installation of a gypsum plant because of lack of water. That condition made the mineral as valueless then as it is now conceded to be for lack of transportation. The record fails to show a serious attempt to sustain the contention that the building stone, sandstone or limestone claimed to have been discovered were "valuable minerals." The record of the hearing contains some testimony as to asphalt, but Denny admitted at the final hearing that the sample exhibited was not taken from these contested claims.

But even without discovery of valuable minerals at the time of location or of valuable minerals other than oil since that time, had the claimants continued in diligent prosecution of work leading to the discovery of oil or gas, the claims would not have been invalidated by the creation of Petroleum Reserve No. 25 or the subsequent

classification of oil lands for leasing only under the Mineral Leasing Act. The lands in Petroleum Reserve No. 25 were restored to the public domain by Executive order of December 24, 1923, but all the lands claimed here were in effect withdrawn when included in Utah Grazing District No. 7 pursuant to public land order dated May 7, 1935 under the Taylor Grazing Act (June 28, 1934, 48 Stat. 1269, 43 U. S. C. sec. 315).

It is evident that the Curry interests abandoned these claims without discovery after they ceased work in 1926, including the Ball A to Y locations made in the names of the surveying crew. Denny refused to offer proof of title to these claims in himself, and in effect admitted that he had not been in diligent prosecution of work on the claims since the beginning of his possession. He has failed to show any rights that the cancelation of these claims has abridged. His attempt to monopolize this considerable area with little or no expenditure or effort is neither a wise nor prudent use of the public domain.¹

The Department's decision in the case of *H. H. Yard, et al.*, 38 L. D. 59, 70, cited by the Commissioner is decidedly in point here:

Charged as it is with the duty of administering the public domain and with disposing of lands therein to qualified applicants under the laws appropriate thereto, it is incumbent upon this Department to see that the public lands are not withheld from use by the Government or from acquisition by proper applicants, through invalid locations, filings or entries made without proper foundation and held without due compliance with law.

The *Yard* decision and the subsequent Supreme Court decision in *Cameron v. United States*, 252 U. S. 450, 464, make it clear that the Department has the power to declare mining claims void and need not wait until an application for patent is filed.

The decision of the Commissioner declaring these 579 placer claims null and void is

Affirmed.

UNITED STATES v. ROBERT L. POPE, JR.

Decided December 29, 1943

STOCK-RAISING HOMESTEAD ACT—FINAL PROOF—EVIDENCE—ADVERSE PROCEEDINGS.

Where an entryman submits final proof which is clearly insufficient on its face, there is no occasion for further proceedings. In some instances the entry-

¹ See *United States ex rel. Borax Company v. Ickes* (App. D. C. 1938, 98 F. (2d) 271) which limits a predisccovery transferee of an association's location of 160 acres to 20 acres immediately surrounding any discovery he may make, in which the court pointed out that to do otherwise would result in developing the minerals on a small portion of the tract only, and foreclose mining opportunity upon the balance to other individuals.

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man may be allowed an opportunity to make a further showing but adverse proceedings against the entry by the Government are not warranted.

APPEAL—COMMISSIONER OF THE GENERAL LAND OFFICE—RULES ON GOVERNMENT CONTESTS.

Under the Rules on Government Contests (43 CFR 222.13), special agents of the General Land Office do not appeal from registers' decisions adverse to the Government. Such decisions are merely advisory and are, therefore, reviewed by the Commissioner of the General Land Office as of course. (Citing *George W. Dally, et al.*, 41 L. D. 295, 299-300; *City of Phoenix*, 53 L. D. 245, 246.)

CHAPMAN, *Assistant Secretary*:

Robert L. Pope, Jr., of Canon City, Colorado, has appealed from a decision of the Acting Assistant Commissioner of the General Land Office, dated August 13, 1943, reversing a decision of the register of the district land office, Pueblo, Colorado, which sustained a demurrer interposed by the appellant at the close of the presentation of the Government's testimony in adverse proceedings against his stock-raising homestead entry Pueblo 056164. The facts in the case are as follows:

On September 26, 1934, Pope applied to make stock-raising homestead entry of the SW $\frac{1}{4}$ Sec. 26, E $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 27, N $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 34, E $\frac{1}{2}$ NE $\frac{1}{4}$, NW $\frac{1}{4}$, S $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 35, T. 16 S., R. 73 W., 6th P. M., and his application was allowed on September 11, 1935. Final proof was submitted by the applicant on November 15, 1940. At that time, one of his two final-proof witnesses, W. B. Ireland of Canon City, Colorado, swore that Pope did not establish or maintain an actual residence on the lands embraced in his entry during the period claimed in the final proof but resided at all times during that period on adjoining lands belonging to his mother. Thereafter, a field investigation was made and adverse proceedings against the entry were ordered charging that the entryman did not establish residence on the land as alleged in the final proof and that he did not maintain residence thereon in the manner and for the periods stated in the final proof. Pope denied these charges and requested a hearing, which was held on April 28, 1943. The Government presented the testimony of four witnesses and rested. Thereupon Pope's counsel demurred to the testimony given in behalf of the Government as being insufficient to support its charges, moved to dismiss the proceedings and submitted no evidence. By decision of May 7, 1943, the register sustained the appellant's demurrer and dismissed the proceedings. As noted above, this decision was reversed by the Acting Assistant Commissioner and the entry was held for cancellation.

In his appeal Pope charges that the Acting Assistant Commissioner committed error in reversing the decision of the register; in reviewing the cause where no appeal had been taken; in finding against the entryman on the issues involved; in not sustaining the demurrer; in resolving all inferences, arising from testimony given, or from lack of evidence, against the entryman, instead of following the rule pertinent to such cases to resolve all inferences and presumptions in favor of the man on the land; in not dismissing the contest proceedings for failure of evidence to support the same; and, in not approving proof submitted and allocating for patent.

The regulations governing stock-raising homestead entries provide in part:

Original stock-raising entries, and additional entries subject to section 3 of the stock-raising law of December 29, 1916 (39 Stat. 863; 43 U. S. C. 293) may be perfected by proofs submitted within five years after their dates on a showing of compliance with the provisions of the 3-year law (Act of June 6, 1912, 37 Stat. 123; 43 U. S. C. 164, 169, 218), except that expenditures for improvements must be shown in lieu of the cultivation required by that Act. [43 CFR 168.1]

Under the 3-year law, in order to become entitled to a patent, an entryman must prove performance of the statutory requisites "by himself and by two credible witnesses." (43 U. S. C. sec. 164.) Under the stock-raising homestead law, therefore, an applicant must prove that he has resided on the land for three years and that he has made permanent improvements thereon having an aggregate value of not less than \$1.25 per acre and such proof must be corroborated by the testimony of two credible witnesses. (43 U. S. C. sec. 293.)

In this case the entryman did not furnish the required proof. The testimony of one of the two final-proof witnesses, W. B. Ireland, not only failed to corroborate the entryman's claims as to residence but cast doubt on the truth of such claims by denying that such residence had been established or maintained. In the circumstances, Pope's final proof should have been rejected summarily for where an entryman's final proof is clearly insufficient on its face, as in this case, there is no occasion for further proceedings. *Cf. Cassius C. Hammond*, 7 L. D. 88. There are instances in which the entryman should be allowed an opportunity to make a further showing but in no case are adverse proceedings by the Government against the entry necessary. The institution of such proceedings in this case and the hearing on them were therefore unwarranted. However, inasmuch as the hearing was held, the facts there adduced are pertinent to consider in the disposition of the case. As was pointed out in the Acting Assistant Commissioner's decision, the transcript of the hearing tends

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to show that the entryman maintained a home away from the homestead all during the life of the entry. Although none of the witnesses for the Government at the hearing testified unequivocally that the entryman resided elsewhere than on the homestead during this period, it is significant, in view of the witnesses' acknowledged acquaintance with the entryman's activities, that not one of them corroborated his claim of residence on the homestead. It is well-nigh inconceivable that persons as well acquainted with the entryman as were these witnesses would not know where he maintained his home. The evident reluctance of the witnesses either to affirm or deny that the entryman resided on the homestead can reasonably be explained only on the ground that while they did not wish to make any statements possibly prejudicial to the homestead claim, they were mindful of their oaths. Had the entryman actually maintained a residence on the homestead to the exclusion of a home elsewhere, as required by the homestead laws, no reason appears why these witnesses would not have testified thereto. In the circumstances, it can only be concluded that the required residence was not established or maintained. For these reasons, too, Pope's final proof must be rejected.

There remains for consideration only the assertion that the Commissioner of the General Land Office was without jurisdiction to consider this case since no appeal had been taken from the register's decision. In this connection, the appellant's attention is directed to paragraph 13 of the Rules on Government Contests (43 CFR 222.13), which provides that the special agent shall not appeal from the decisions of the register. The reason for this provision lies in the fact that the register's decisions are only advisory with respect to the interest of the Government and are, therefore, reviewed by the Commissioner as of course. *George W. Dally, et al.*, 41 L. D. 295, 299-300; *City of Phoenix*, 53 L. D. 245, 246.

The decision appealed from is

Affirmed.

**ATLANTIC AND PACIFIC RAILROAD COMPANY, SANTA FE PACIFIC
RAILROAD COMPANY, AND GREENE CATTLE COMPANY, INC.**

Decided January 8, 1944

Motion for Rehearing decided February 8, 1944

RAILROAD LAND GRANTS—STATUTORY CONSTRUCTION—TRANSPORTATION ACT OF 1940—INTENT OF CONGRESS—SAVING CLAUSE OF SECTION 321(b).

The language of section 321(b) of the Transportation Act of 1940 which permits the Secretary of the Interior to issue patents confirming the title

to such lands as he shall find have been sold to an innocent purchaser for value, indicates the intent of Congress to insure the survival of some rights to railroad grant lands but it does not authorize the Secretary to issue patents in instances where the right does not exist irrespective of this statute.

RAILROAD LAND GRANTS—RELATION OF THE UNITED STATES AND THE GRANTEE—VESTING OF TITLE TO PLACE LANDS AND INDEMNITY LANDS.

A congressional grant to a railroad company of the odd-numbered sections on either side of a railroad to be built constitutes an offer which ripens into a contract when the railroad company indicates its acceptance by filing a map of location showing the route of the road and on location of the road the company acquires an estate in the specifically granted place lands which relates back to the date of the granting act.

The right to select indemnity land to replace losses in the place lands becomes an estate in land only when losses in the place lands have been ascertained and the right to select has been exercised.

RAILROAD LAND GRANTS—NATURE OF THE RIGHT TO SELECT INDEMNITY LANDS.

The right to select indemnity lands is in the nature of a grant of power dependent upon a future contingency which attaches to no specific lands until it is exercised.

RAILROAD LAND GRANTS—TITLE TO INDEMNITY LANDS—PURPORTED SALE OF UNSELECTED INDEMNITY LANDS.

A railroad company acquires no title to indemnity lands prior to the exercise of its right of selection and a purported sale of unselected land within the indemnity limits of a railroad land grant is without effect except as it may operate as a contract to convey or an assignment of the benefits which will accrue when the right to select has been exercised.

RAILROAD LAND GRANTS—GRANTEE'S RELEASE OF ITS UNEXERCISED RIGHT TO SELECT INDEMNITY LANDS.

A grantee railroad company's release of all claims under a railroad land grant extinguishes the company's unexercised right to select indemnity land.

RAILROAD LAND GRANTS—DEFICIENCY IN INDEMNITY LANDS—DOCTRINE OF THE NORTHERN PACIFIC CASES.

Although under the doctrine of the *Northern Pacific Cases* the United States is precluded from depriving a railroad company of its right to indemnity lands by appropriating such lands for public purposes when losses in the place lands exceed the available indemnity lands the railroad company acquires no title to indemnity lands in the absence of selection.

RAILROAD LAND GRANTS—SELECTION OF INDEMNITY LAND—NECESSITY OF SURVEY.

The selection of indemnity land identifies the specific sections of land to which the rights of the railroad company attach, but because specific sections of land do not exist before survey, indemnity lands cannot be identified prior to survey.

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INNOCENT PURCHASERS—NOTICE OF DEFECTS IN TITLE.

Purchasers of land are charged with notice of all defects in title indicated by the recitals in the deeds in the chain of title.

CHAPMAN, *Assistant Secretary*:

This is an appeal by the Santa Fe Pacific Railroad Company from the decision of the Commissioner of the General Land Office of May 8, 1943, rejecting its application for patent, Phoenix 080785, covering 3,014.5 acres of land in Secs. 3, 5, 7, 9 and 11, T. 17 N., R. 9 W., G. & S. R. B. & M., in Yavapai County, Arizona.

In the act of July 27, 1866 (14 Stat. 292), Congress authorized the Atlantic and Pacific Railroad Company to build a railroad from Springfield, Missouri, to the Pacific Coast. To aid in the construction of the railroad, it granted to the company every odd-numbered section of land in a strip 40 miles wide on either side of the road and gave the company a right to indemnify itself for losses in these lands occasioned by appropriation of settlers, by selecting odd-numbered sections within a strip 10 miles wide outside of each of the 40-mile strips. Pursuant to this act, the Atlantic and Pacific Railroad Company built a railroad from Springfield, Missouri, to the east boundary of California. From time to time as the work progressed, the Company filed its selections of indemnity land in States where the road had been built and losses in the specifically granted or place lands had been ascertained. In 1887, it filed a selection list for indemnity land in Arizona which included the land described in the pending application for patent (Prescott 1). The local land officers rejected this selection on the ground that the land was not subject to selection because it was still unsurveyed. The General Land Office affirmed the local officers and the Department sustained its decision in 1889. In 1893, the Department denied a motion for review and the General Land Office canceled the selection (F-Docket 6-5804, November 25, 1912, Miscellaneous File No. 278286). No further attempt was ever made to select this land although an official survey was made in 1938 and the official plat was approved on April 30, 1940, and filed on December 10, 1940.

On December 18, 1940, the Santa Fe Pacific Railroad Company, purchaser of the property of the Atlantic and Pacific Railroad Company at foreclosure sale and owner of the land grant of that company under the act of March 3, 1897 (29 Stat. 622), filed a release in accordance with section 321(b), Part II, Title III of the Transportation Act of 1940 (54 Stat. 954, 49 U. S. C. sec. 65), and departmental regulations dated October 10, 1940 (43 CFR 273.61-273.67). The release relinquished, remised and quitclaimed to the United States—

* * * any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

It excepted—

* * * lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad.

At the same time, the Santa Fe Pacific Railroad Company filed a list of persons alleged to be innocent purchasers for value to whom it had sold unpatented lands within the limits of the grant prior to September 18, 1940, when the Transportation Act became effective. This list included the Greene Cattle Company, Incorporated, now alleged to be the purchaser of the land covered by the pending application for patent. The release was approved March 1, 1941.

On March 3, 1943, under regulations dated December 10, 1941 (43 CFR 273.68-273.74), the Santa Fe Pacific Railroad Company filed an application for patent on behalf of the Greene Cattle Company, Incorporated, claiming the right to a patent to five sections of land in Yavapai County, Arizona, under the innocent purchaser provision of the saving clause of section 321(b), Part II, Title III of the Transportation Act of 1940.

The application alleges that at various times between January 1, 1886, and January 1, 1896, the Atlantic and Pacific Railroad Company contracted to sell a portion of the land included in the grant of 1866, to E. B. Perrin, and that the company and C. W. Smith, Receiver, conveyed the land involved in this appeal, together with other land, to E. B. Perrin and Robert Perrin by deed of October 15, 1896. The deed, which appears in the abstract of title accompanying the application, is written evidence of a compromise of the contract rights of the parties whereby the railroad company purported to convey 39,667.86 acres in Yavapai County to the Perrins, with certain reservations, and E. B. Perrin and Robert Perrin reconveyed to the Receiver certain lands in Coconino County, which the railroad company had inadvertently conveyed to them as part performance of its contract obligations. This instrument describes the land conveyed to the Perrins by section, township and range, but recites that a portion of the land is within the indemnity limits of the grant to the Atlantic and Pacific Railroad Company and that it was then unsurveyed.

In 1917, Robert Perrin quitclaimed his interest in the land purchased from the Atlantic and Pacific Railroad Company to E. B.

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Perrin. In August and September 1934, after the death of E. B. Perrin, the widow, the surviving children of E. B. Perrin, and Perrin Properties, Incorporated, executed quitclaim deeds of the land described in the pending application and other lands, to the Security-First National Bank of Los Angeles. On January 30, 1941, the bank quitclaimed these and other lands to the Greene Cattle Company, Incorporated, for a consideration of "\$10 and other good and valuable things." The land was included in the general withdrawal by Executive order of November 26, 1934, and was subsequently leased to the Greene Cattle Company, Incorporated (Phoenix 078834), under the Taylor Grazing Act (48 Stat. 1269, 43 U. S. C. sec. 315).

In section 321(a) of Part II, Title III of the Transportation Act of 1940, the land grant railroad companies were permitted to charge the United States full commercial rates for transportation of passengers or freight, with certain specified exceptions, instead of 50 per cent of the regular rates previously charged, but as a condition precedent to the effectiveness of this provision the railroads were required to file a release of all claims arising under the land grants. Section 321(b) provides:

If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from September 18, 1940. * * * [54 Stat. 954, 49 U. S. C. sec. 65.]

Then follows a saving clause which provides that—

* * * Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

We think it clear that Congress intended by the saving clause merely to assure the survival, despite the filing of a release pursuant

to the statute, among other things, of any theretofore existing authority in the Secretary to issue patents confirming the title to such lands as he shall find have been sold by a carrier to an innocent purchaser for value. The language of the clause in this respect permits no other meaning. "Nothing in this section," says the clause is "to prevent the issuance" of such a patent. The words obviously did not create a duty on the part of the Secretary to issue a patent, or a right in the carriers to receive one, if, this statute apart, neither the duty nor the right existed. Moreover, since the Transportation Act grants to the railroad companies the privilege of imposing a 50 percent increase in freight rates payable by the United States, subject to compliance with the condition precedent of releasing all claims under the land grants, it is in substance a granting act and as such is subject to the well-recognized rule that grants of the sovereign should be strictly construed in favor of the grantor. *United States v. Butte, A. & P. Ry. Co.*, 38 F. (2d) 871, 873.

In its decisions construing the railroad land grants, the Supreme Court has repeatedly held that the congressional grant of the odd-numbered sections of land within a belt extending for a designated number of miles on either side of a railroad to be built in the future, constitutes an offer which ripens into a contract when the railroad company indicates its acceptance by filing a map of location showing the route of the road [*Burke v. Southern Pacific R. R. Co.*, 234 U. S. 669, 680; *United States v. Northern Pac. Ry. Co.*, 256 U. S. 51, 64; *Southern Pacific Co. v. United States*, 307 U. S. 393, 396; *United States v. Northern Pacific Ry. Co.*, 311 U. S. 317, 330], and that by filing the map of location the railroad acquires an estate in the specifically granted land which relates back to the date of the granting act. *Wisconsin Railroad Co. v. Price County*, 133 U. S. 496; *Deseret Salt Co. v. Tarpey*, 142 U. S. 241; *Howard v. Perrin*, 200 U. S. 71; *Weyerhaeuser v. Hoyt*, 219 U. S. 380. But the right to select additional sections of land to replace losses in the land specifically granted becomes an estate in land only when the fact of loss in the place limits of the grant has been ascertained and the right to select indemnity land has been exercised. *United States v. Anderson*, 194 U. S. 394; *Payne v. Central Pacific Ry. Co.*, 255 U. S. 228. The courts have consistently held that a grantee has no estate in indemnity land prior to its selection of specific sections of such land. In *United States v. Southern Pac. R. R. Co.*, 223 U. S. 565, 570, Mr. Justice Holmes said:

An indemnity grant, like the residuary clause in a will, contemplates the uncertain and looks to the future. What a railroad is to be indemnified for may be fixed as of the moment of the grant, but what it may elect when its

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right to indemnity is determined depends on the state of the lands selected at the moment of choice. Of course the railroad is limited in choosing by the terms of the indemnity grant, but the so-called grant is rather to be described as a power. Ordinarily no color of title is gained until the power is exercised.

In *Northern P. R. Co. v. Lane*, 46 App. D. C. 434, 439, the court quoted this statement and added that "The right of selection of indemnity lands is in the nature of a grant of power conferred by statute and dependent upon a future contingency." And in *Payne v. Central Pac. Ry. Co.*, 255 U. S. 228, 237, the court held that the rights of a grantee to indemnity lands are "rights which became vested by its selection of those lands."

The right of the grantee in indemnity lands prior to selection has also been described as "only a float" which attaches to no specific lands until the selection is actually made [*Ryan v. Railroad Company*, 99 U. S. 382, 386; *Cedar Rapids, etc., Railroad v. Herring*, 110 U. S. 27, 39], or as a right to no land capable of identification by any principles of law or rules of measurement. *Kansas Pacific Railroad Company v. Atchison, Topeka & Santa Fe Railroad Company*, 112 U. S. 414, 421. "The reason for this is that, as no vested right can attach to the lands in place * * * until these sections are ascertained and identified by a legal location of the line of the road, so in regard to the lands to be selected within a still larger limit, their identification cannot be known until the selection is made." *St. Paul Railroad v. Winona Railroad*, 112 U. S. 720, 731, 732; *Southern Pacific Railroad Co. v. Bell*, 183 U. S. 675, 682.

Because indemnity lands are incapable of identification until selection is made and approved, they remain the property of the United States. It is true that the Government is bound by its promise to give its grantee indemnity lands in lieu of those specifically granted, but that promise passes no legal title, and, until it is executed, creates in the grantee no legal interest in land entitled to recognition or protection. *Wisconsin Railroad Co. v. Price County*, 133 U. S. 496, 512; *Southern Pacific Railroad Company*, 53 I. D. 211, 213.

The record in this case discloses that the Atlantic and Pacific Railroad Company made one attempt to exercise its right to select the land included in the pending application. This attempt was unsuccessful because the land had not been surveyed and the specific sections to which it might be entitled could not be identified. But because it had the right to select odd-numbered sections within the indemnity limits of the grant, in the deed to the Perrins the Atlantic and Pacific Railroad Company actually inserted a legal description of certain odd-numbered sections of land. This was a fictitious

description because these subdivisions had not been established by survey. A survey of public land does not identify the legal subdivisions by which the land is to be known thereafter; it creates them. *Sawyer v. Gray*, 205 Fed. 160, 163; *Coa v. Hart*, 260 U. S. 427, 436; *United States v. Northern Pacific Ry. Co.*, 311 U. S. 317, 344. The Atlantic and Pacific Railroad Company had not acquired any estate in the indemnity land which it purported to convey to the Perrins because of its failure to perfect its inchoate right to indemnity land by selecting specific land to which that right could attach. The deed may have been effective as a contract to convey [*Missouri, Kansas and Texas Railway Company v. Kansas Pacific Railway Company*, 97 U. S. 491, 497; *United States v. Southern Pacific Railroad*, 146 U. S. 570, 598] or as an assignment of benefits which would accrue if and when the right to select should be exercised. But the deed actually conveyed nothing to the Perrins.

The Santa Fe Pacific Railroad Company made no attempt to exercise the right to select the land in controversy after it acquired the rights of the Atlantic and Pacific Railroad Company. Almost 50 years later, it voluntarily relinquished all claims arising out of any land grant to itself or its predecessor in interest pursuant to the provisions of the Transportation Act. Whatever right to select indemnity lands may have theretofore existed was extinguished by the filing of the release. In the absence of a selection of surveyed lands before the filing of the release, no right to a patent to any indemnity lands existed and title remained in the United States. Hence, we do not see how the railroad or anyone claiming through the railroad, can be aided by a provision that nothing in the statute shall prevent the "issuance of patents confirming the title" to lands "sold" by the railroad to an innocent purchaser. *Of Chapman & Dewey v. St. Francis*, 232 U. S. 186, 198.

Appellant seeks to avoid the effect of its failure to select the land for which patent is sought on the basis of *United States v. Northern Pac. Ry. Co.*, 256 U. S. 51, and *United States v. Northern Pac. Ry. Co.*, 311 U. S. 317. It argues that these decisions expressly recognize that a railroad company has a vested right to indemnity lands even in the absence of selection if there is a deficiency in the place lands of such magnitude that all of the indemnity land is required to replace the loss. These decisions do not sustain appellant's contention, even if the facts upon which their applicability depends, are assumed. In the first *Northern Pacific* case, the specific question at issue assumed the existence of losses in the place limits of the grant to the railroad company which equaled or exceeded the available indemnity land and required the court to determine whether or not

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under such circumstances a withdrawal of indemnity land by the United States could defeat the rights of the railroad company. The Supreme Court held that even though the grantee has not perfected its right to indemnity land by exercising the right of selection, the United States may not render itself unable to perform the known obligations of its contract with the railroad and directed that the question of deficiency be determined in the Land Office since the United States is free to withdraw land within the indemnity limits of a railroad grant at any time until it is established that all of this land is needed to replace losses in the place limits of a grant. In the later *Northern Pacific* case, the court summarized the ruling in the earlier case as requiring "the Government to refrain from any action which would deprive the company of its right of selection in accordance with the terms of the grant." (At page 346.) The court expressly recognized that specific sections of land do not exist until a survey has been made and that indemnity lands are not identified so that any right attaches thereto until selection has been made (at pages 344, 329). In neither case, nor in any other case, has the court recognized that a grantee's right to select indemnity land constitutes an estate in land. Nor did they involve any such voluntary release by the grantee of its claims as does this case. It follows that appellant's claim is not aided by the *Northern Pacific* decisions.

In any event, the receiver's deed of 1896 recites that a portion of the land described therein, which was within the indemnity limits of the grant, was unsurveyed. This was sufficient to indicate that the Atlantic and Pacific Railroad Company had no title to the unsurveyed land and to require the Perrins to make inquiry as to the nature of its right in all the land described in the deed. *Brush v. Ware*, 40 U. S. 93. Inquiry of the General Land Office would have disclosed that all of the land described in the application for patent was unsurveyed; that the Atlantic and Pacific Railroad Company had not perfected its right to indemnity land by selecting this land; and that, consequently, it had no title to any of the land described in the deed. The Greene Cattle Company, Incorporated, is charged with notice of all defects in title revealed or suggested by the recitals in the deeds in the chain of title upon which it relies. *Oliver v. Piatt*, 44 U. S. 333; *Cordova v. Hood*, 84 U. S. 1; *Maury v. Jones*, 25 F. (2d) 412. Because the Greene Cattle Company, Incorporated, and its predecessors in the chain of title upon which its rights are predicated, were charged with notice of the Atlantic and Pacific Railroad Company's want of title they

cannot be regarded as innocent purchasers. Hence, the saving clause is for that reason alone not applicable.

Because of the views herein expressed, it is unnecessary to consider other possible grounds for concluding that the Greene Cattle Company, Incorporated, is not an innocent purchaser for value.

The decision of the Commissioner is

Affirmed.

MOTION FOR REHEARING

On January 8, 1944, this Department affirmed the decisions of the Commissioner of the General Land Office, rejecting the Santa Fe Pacific Railroad Company's applications, Phoenix 080632 and 080785, for patent to certain odd-numbered sections of land in Yavapai, Navajo and Coconino Counties, Arizona, on the ground that the company had relinquished its rights to such lands by filing a release of all claims to land under any grant in aid of the construction of a railroad pursuant to section 321(b) of the Transportation Act of 1940. The Santa Fe Company has filed motions for rehearing, alleging that the decisions of January 8, 1944, are based upon vital errors which deprive the company and those who claim through it of vested rights to the land in question, and argues that the Department erred in determining that it had no vested right in the land in question and that its right was not preserved by the saving clause of the release.

The Santa Fe Company's claim to patent is based upon its right to select indemnity lands pursuant to the land grant to the Atlantic and Pacific Railroad Company of July 27, 1866 (14 Stat. 292), which was confirmed in the Santa Fe Pacific Railroad Company by act of March 3, 1897 (29 Stat. 622). The Santa Fe Company's right to select the land involved in these appeals as indemnity land prior to the filing of its release is conceded, but the record shows that no selection was ever made. On December 18, 1940, the Santa Fe Company filed a release of all claims to land arising from any grant of land by any act of Congress to itself or to any predecessor in interest in aid of the construction of any portion of its railroad. This release, in harmony with the provisions of the saving clause of section 321(b) of the Transportation Act of 1940, excepted only lands sold to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, and lands certified or patented to the company. The decisions of January 8, 1944, held that in the absence of selection the company in any event had no estate in land which was excepted from the release.

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In its motions for rehearing, the Santa Fe Company concedes that it has no estate in the land for which patent is sought in these words:

* * * It is true that the right of indemnity selection is not an estate in land, that prior to a valid selection of particular lands the rights of others may attach, that even as against the United States the right of the grantee to particular lands ordinarily does not attach until a selection is made, and that title to the lands available for indemnity and subject to selection remains in the United States until valid selections are made and approved.

It contends, however, that under the *Northern Pacific* cases,¹ it had a right against the United States of which it cannot be deprived even prior to selection if there is a deficiency in the grant of such an extent that all the available indemnity lands are required to satisfy this deficiency. This may be conceded *arguendo* without altering the conclusion stated in the departmental decisions of January 8, 1944. Numerous decisions, which appellant recognizes, declare that the right to indemnity land is an inchoate right which can be perfected only by selection of specific sections of land. The *Northern Pacific* cases recognize this doctrine, but hold that when it is known that all the available indemnity land is needed to replace losses in a railroad grant, the United States is not at liberty to dispose of that indemnity land, even in advance of selection, thus rendering impossible the future performance of its contract obligations to the grantee railroad. If such deficiency existed in the Santa Fe Pacific Railroad Company grant, it is apparent, therefore, that the United States was precluded from withdrawing indemnity land and defeating the Santa Fe Company's rights. But the United States did not deprive the Santa Fe Company of any land. The Santa Fe Company voluntarily renounced all its rights to land under any land grant. Under the Transportation Act of 1940, such renunciation constitutes the consideration for the congressional grant of the privilege of charging the United States the regular rates for transportation over the company's railroad.

It is true that the Santa Fe Company's release recognized certain exceptions, but its inchoate right to select indemnity land was not excepted from the terms of the release for the reason that the release, in harmony with the provisions of section 321(b), did not except or purport to except inchoate rights to land. The language of the release and of the statute makes this very clear. Both refer to "lands" sold, selected or patented. There is no mention of any unperfected right to acquire land. It follows that by filing its release, the Santa Fe Company relinquished its inchoate right to select indemnity land

¹ *United States v. Northern Pac. Ry. Co.*, 256 U. S. 51; 311 U. S. 317.

although in the absence of such release the United States could not have disposed of the land in derogation of the company's rights. The fact that the company had previously attempted to convey the land for which it now seeks a patent is immaterial since it had no title to the land and could convey none. At most the company effected nothing more than a promise to sell or an assignment of the benefits to accrue from the exercise of its selection right. There was no sale of land to an innocent purchaser and the company cannot claim the advantage of such procedure to avoid the consequences of the release.

The motions for rehearing are

Denied.

ATLANTIC AND PACIFIC RAILROAD CO., SANTA FE PACIFIC RAILROAD CO., AND AZTEC LAND AND CATTLE CO., LTD.

Decided January 8, 1944

*Motion for Rehearing decided February 8, 1944**

RAILROAD LAND GRANTS—TITLE TO INDEMNITY LANDS—PURPORTED SALE OF UNSELECTED INDEMNITY LANDS.

A railroad company acquires no title to indemnity land under a railroad land grant prior to the exercise of its right of selection and a purported sale of unselected land within the indemnity limits of the grant is ineffective.

STATUTORY CONSTRUCTION—TRANSPORTATION ACT OF 1940—SAVING CLAUSE OF SECTION 321 (b)—INNOCENT PURCHASERS.

A transfer of a railroad company's right to unselected indemnity lands is not a sale of land within the meaning of the saving clause of section 321 (b) of the Transportation Act of 1940 so that patent may be issued for the benefit of an innocent purchaser for value. Controlled by decision in the companion case of *Santa Fe Pacific Railroad Company*, 58 I. D. 577.

CHAPMAN, *Assistant Secretary*:

This is an appeal by the Santa Fe Pacific Railroad Company from the decision of the Commissioner of the General Land Office of April 8, 1943, rejecting application for patent, Phoenix 080632, to 98,690.83 acres of land in Navajo and Coconino Counties, Arizona.

The land in question is within the exterior boundaries of the Black Mesa Forest Reserve established by an Executive proclamation, dated August 17, 1898, pursuant to section 24 of the act of March 3, 1891 (26 Stat. 1095), now the Coconino and Sitgreaves National Forests, and was included in the indemnity limits of the grant of land to the Atlantic and Pacific Railroad Company under the act of July 27,

* See page 586.

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1866 (14 Stat. 292), which was confirmed in its successor in interest, the Santa Fe Pacific Railroad Company, by the act of March 3, 1897 (29 Stat. 622).

On June 20, 1887, the Atlantic and Pacific Railroad Company filed an indemnity selection under the act of July 27, 1866, which included all of the land described in the pending application for patent (Prescott 1), but it was rejected by the General Land Office because the land was unsurveyed and therefore not subject to selection. The Department upheld the Land Office decision (8 L. D. 307), and the selection was finally canceled on July 18, 1893 ("F" Docket 6-5804, November 25, 1912, Miscellaneous File No. 278286). No attempt to select this indemnity land has since been made although official surveys covering all but 480 acres of it were made and the official plats of the surveys were filed with the Land Office in 1896, 1918, 1922, 1936, and 1939.

On December 18, 1940, the Santa Fe Pacific Railroad Company and the Atchison, Topeka and Santa Fe Railroad Company, operator of the line of railroad, filed releases of all claims arising from any land grant in aid of the construction of a railroad in accordance with section 321(b), Part II, Title III, of the Transportation Act of 1940 (54 Stat. 954, 49 U. S. C. sec. 65). These releases excepted lands sold to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made and approved by the Secretary of the Interior prior to September 18, 1940, and lands already patented or certified to the grantee. The releases were approved on March 1, 1941. As required by departmental regulations dated October 10, 1940 (43 CFR 273.61-273.67), the Santa Fe Pacific Railroad Company also filed a list of land and persons alleged to have become innocent purchasers of specific portions of the listed land prior to the effectiveness of the Transportation Act on September 18, 1940. This list included the lands in question and named the Aztec Land and Cattle Company as its purchaser.

Thereafter, on June 26, 1942, the Santa Fe Pacific Railroad Company filed its application for patent to the land, alleging that this land was sold to the Aztec Land and Cattle Company, Ltd., in 1886. The contract offered to support this allegation, dated February 3, 1886, contains the promise of the Atlantic and Pacific Railroad Company to sell the Aztec Land and Cattle Company, Ltd., certain tracts of land located in Apache and Yavapai Counties, Territory of Arizona, estimated to contain approximately 1,058,560 acres for a consideration of \$529,280, and bound the railroad to obtain patents to the said land from the United States and to convey by warranty deed within a period of two years from the date of the contract. A quit-

claim deed dated November 7, 1905, offered as further evidence of the alleged sale, was entered into between the Santa Fe Pacific Railroad Company, as successor in interest to the Atlantic and Pacific Railroad Company, and the Aztec Land and Cattle Company, Ltd. It recites that on May 12, 1886, and May 25, 1894, the Atlantic and Pacific Railroad Company conveyed to the Aztec Land and Cattle Company, Ltd., a portion of the lands described in the contract of February 3, 1886, amounting to 576,701.91 acres and that said Aztec Land and Cattle Company, Ltd., was entitled to receive conveyance of an additional 423,298.09 acres of land; and contains the Santa Fe Pacific Railroad Company's release and quitclaim to the Aztec Land and Cattle Company, Ltd., for a consideration of \$1, of all of its right, title and interest to certain land described by township, range and section, located in the counties of Navajo and Coconino, in the Territory of Arizona, and estimated to contain 423,270.35 acres.

The Santa Fe Pacific Railroad Company relies upon the foregoing to establish its contention that the Aztec Land and Cattle Company is an innocent purchaser for value of the land included in the application for patent within the meaning of the second provision of the saving clause of section 321(b) of the Transportation Act of 1940 which provides:

* * * Nothing in this section shall be construed * * * to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value * * *.

In his decision of April 8, 1943, the Commissioner rejected the application on the ground that the land had not been ascertained and identified so that the railroad acquired any interest in specific land which it could convey prior to the filing of its release and that, therefore, its transferee is not protected under the saving clause of section 321(b) of the Transportation Act. The Commissioner also noted the existence of certain forest homestead entries and other adverse claims to the lands covered by the application.

On this appeal appellant contends that the Commissioner erred (1) in failing to determine whether or not at the time of the withdrawal there were losses in the place lands granted to the Atlantic and Pacific Railroad Company of such extent that all of the indemnity land was and has since been required to replace these losses; (2) in failing to determine to what extent there are intervening or superior adverse claims to any of the land in question; and (3) in determining that appellant is not entitled to a patent under the provisions of the Transportation Act of 1940.

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A finding by the Commissioner that all of the indemnity land was required to replace losses in the place limits of the grant at the time of the withdrawal would be immaterial for the reason that the right of the United States to withdraw the land is not in issue. The question to be decided concerns the effect of appellant's voluntary relinquishment of all claims to the land, which is in no way affected by the fact that the indemnity land relinquished did or did not exceed losses in the place lands. Likewise, a determination of the extent and validity of adverse claims in this land is not material unless and until appellant's claim has otherwise been established.

At the time of the compromise settlement between the Santa Fe Pacific Railroad Company and the Aztec Land and Cattle Company the land had not been surveyed. Most of the land has since been surveyed, but the railroad company never exercised its right to select this land. It follows that the railroad's right to select the lands was relinquished by the filing of the release and that neither the railroad nor anyone claiming through the railroad has any right to a patent. *Santa Fe Pacific Railroad Company*, 58 I. D. 577.

The decision of the Commissioner is

Affirmed.

SANTA FE PACIFIC RAILROAD COMPANY

Decided January 8, 1944

RAILROAD LAND GRANTS—JURISDICTION TO DETERMINE RIGHTS OF PERSONS CLAIMING THROUGH THE GRANTEE—ISSUANCE OF PATENTS.

The railroad land grants confer upon this Department no jurisdiction to determine the rights of persons asserting claims to granted land under contracts with the grantee.

In the absence of legislative or judicial recognition of a claimant as a successor of the grantee, the Department issues patents to the grantee even though the grantee has assigned its rights to another.

RAILROAD LAND GRANTS—INDEMNITY LANDS—ASSIGNMENT OF THE SELECTION RIGHT.

The right to select indemnity lands cannot be assigned so that the assignee may exercise the right as successor to the grantee and a transfer of the benefits to accrue from the exercise of the grantee's right of selection gives the transferee no greater rights than the grantee then has.

RAILROAD LAND GRANTS—INDEMNITY LANDS—VESTING OF TITLE IN THE GRANTEE.

A railroad land grant confers no right to specific lands within the indemnity lands until the grantee's right of selection has been exercised.

Title to indemnity land vests when an approved selection has been made.

STATUTORY CONSTRUCTION—TRANSPORTATION ACT OF 1940—SAVING CLAUSE OF SECTION 321 (b)—INNOCENT PURCHASERS.

A transfer of a railroad company's right to unselected indemnity lands is not a sale of land within the meaning of the saving clause of section 321 (b) of the Transportation Act of 1940 so that patent may be issued for the benefit of an innocent purchaser for value.

CHAPMAN, *Assistant Secretary*:

On December 18, 1940, the Santa Fe Pacific Railroad Company, successor in interest to the grant to the Atlantic and Pacific Railroad Company under the act of July 27, 1866 (14 Stat. 292), and the Atchison, Topeka and Santa Fe Railroad Company, operator of the line of railroad, filed in the General Land Office releases of all claims to lands under said grant in accordance with section 321 (b), Part II, Title III of the Transportation Act of September 18, 1940 (54 Stat. 954, 49 U. S. C. sec. 65), and regulations of October 10, 1940 (43 CFR 273.61-273.67). The text of said section 321 (b) is as follows:

If any carrier by railroad furnishing such transportation, or any predecessor in interest, shall have received a grant of lands from the United States to aid in the construction of any part of the railroad operated by it, the provisions of law with respect to compensation for such transportation shall continue to apply to such transportation as though subsection (a) of this section had not been enacted until such carrier shall file with the Secretary of the Interior, in the form and manner prescribed by him, a release of any claim it may have against the United States to lands, interests in lands, compensation, or reimbursement on account of lands or interests in lands which have been granted, claimed to have been granted, or which it is claimed should have been granted, to such carrier or any such predecessor in interest under any grant to such carrier or such predecessor in interest as aforesaid. Such release must be filed within one year from the date of the enactment of this Act. Nothing in this section shall be construed as requiring any such carrier to reconvey to the United States lands which have been heretofore patented or certified to it, or to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value or as preventing the issuance of patents to lands listed or selected by such carrier, which listing or selection has heretofore been fully and finally approved by the Secretary of the Interior to the extent that the issuance of such patents may be authorized by law.

The release filed by the Santa Fe Pacific Railroad Company, relinquished, remised and quitclaimed to the United States—

* * * any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

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It excepted from the release only—

* * * lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad.

On March 23, 1943, John H. Page and Company by authority of the Santa Fe Pacific Railroad Company filed lieu indemnity selections under the acts of June 22, 1874 (18 Stat. 194, 43 U. S. C. sec. 888), and August 29, 1890 (26 Stat. 369, 43 U. S. C. sec. 889), Phoenix 080805 to 080808, inclusive, accompanied by petitions to classify the lands selected under section 7 of the Taylor Grazing Act. The affidavits supporting the petition for classification stated that the beneficiary under the selection is the Greene Cattle Company, Incorporated, and in a letter of John H. Page and Company to the register it is stated that "These selection rights were purchased from Santa Fe Pacific Railroad Company many years ago."

The Commissioner of the General Land Office by decision of May 22, 1943, rejected the selections on the ground that the right to make them had been released by the Santa Fe Pacific Railroad Company. The Commissioner stated:

Other than the statement of John H. Page and Company in their letter to the Register, *supra*, that these selection rights were purchased from the railroad company many years ago, there is with the record no evidence of a sale. The exception in section 321(b) protects certain sales of lands to innocent purchasers for value. It does not protect a sale of mere rights of selection, at the most in the nature of floats, not attached to any tracts and which may never be exercised, the filing of a selection being presumably at the option of the purchaser. As no land was sold, these transactions do not come within the protection of this exception.

The theory back of the filing of selections 080805 to 080808 inclusive, may be that the railroad company's rights under the acts of 1874 and 1890 were not in fact released. The releases, in conformity with the Transportation Act and the regulations, are broad and include all rights and claims pursuant to, growing out of, or arising from the grants except the three types of claims specifically excluded therefrom, above-mentioned, relative to patented, clear listed, and sold lands. All outstanding unused selection rights under these acts were released. Such rights may not now be asserted as a basis for the acquisition of public lands.

John H. Page and Company, as agents for the selector, have appealed. Under various forms of statement their contention is that the outstanding unused selection rights under the acts of 1874 and 1890 which had been sold by the Santa Fe Pacific Railroad Company prior to September 18, 1940, to innocent purchasers for value, were not owned or claimed by said company and were not released by the

company but are protected by the exception in section 321(b) of the Transportation Act.

The appeal is supported by an affidavit executed by John H. Page, senior partner of the firm of John H. Page and Company, which, among other things, states that the said firm in September 1932 purchased from Hugo Seaberg, of Raton, New Mexico "for a valuable consideration the selection rights of the Santa Fe Pacific Railroad Company under the acts of 1874 and 1890, as follows: * * *." Then follows a description of the base land offered in exchange for the land selected in the above-mentioned applications. It is further stated, in substance, that Seaberg requested W. B. Collinson, Land Commissioner of Santa Fe Pacific Railroad Company, to record John H. Page and Company "as owners of the above rights"; that the applications to select were signed by Collinson, the Land Commissioner, and that thereafter, he being deceased, the affiant requested E. O. Hemenway, the Land Commissioner of said railroad company, to furnish John H. Page and Company with new applications to select to take the place of those signed by Collinson, and new applications were signed by Hemenway and forwarded to John H. Page and Company on July 27, 1937, and these applications are the ones used in support of the applications Phoenix 080805-080808.

In the showings of appellant as to its transactions relating to the selections with Page and Company, no sale of the right of selection to them is discerned. If the application to select had been made by Page and Company as an assignee or transferee of the railroad grantee, it would have been under the rules and practice of the Department forthwith rejected. The Department does not undertake to determine whether an applicant for selection other than the railroad grantee is a successor in interest to the land grant rights, and in the absence of legislation or judicial recognition of such applicant as a successor in interest, patents under the grant are issued to the grantee company. *Southern Pacific Land Company*, 42 L. D. 522. And in the administration of such grants the Department always deals with the grantee itself and not with parties claiming to be in privity with it, as the granting act does not confer on it jurisdiction to determine the relations between the grantee company and private individuals. *Perrin v. Santa Fe Pacific Railroad Company*, 43 L. D. 467.

The most that can be said from the nature of the showings is that the Santa Fe Pacific Railroad Company for a valuable consideration promised to exercise its right of selection at the instance and for the benefit of Page and Company as to such lands as the latter might designate, and upon the perfection of the selection or upon issuance of patent to the grantee to convey the land to Page and Company

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or to whom the contract had been assigned. But regardless of whether the selection right is assignable and the transaction here alleged may be considered as such an assignment, it is obvious the railroad company could not assign any more right than was conferred upon it by law.

As said in *Southern Pacific Railroad Company*, 53 I. D. 211, 213, "The Supreme Court has repeatedly held in substance that the granting acts conferred no rights to specific tracts within the indemnity limits until the grantee's right of selection had been exercised." In *Clark v. Herington*, 186 U. S. 206, 209, the court said:

* * * and it is familiar law that no title to indemnity lands is vested until an approved selection has been made, and that up to such time Congress has full power to deal with lands in the indemnity limits as it sees fit. As said in *Kansas Pacific Railroad v. Atchison Railroad*, 112 U. S. 414, 421: "Until selection was made the title remained in the government, subject to its disposal at its pleasure." See, also, *Ryan v. Railroad Company*, 99 U. S. 382; *Grinnell v. Railroad Company*, 103 U. S. 739; *Cedar Rapids &c. Railroad v. Herring*, 110 U. S. 27; *St. Paul Railroad v. Winona Railroad*, 112 U. S. 720, 731; *Barney v. Winona &c. Railroad*, 117 U. S. 228, 232; *Sioux City Railroad v. Chicago Railway*, 117 U. S. 406, 408; *Wisconsin Railroad v. Price County*, 133 U. S. 496, 511; *United States v. Missouri &c. Railway*, 141 U. S. 358, 375; *Hewitt v. Schultz*, 180 U. S. 139; *Southern Pacific Railroad Company v. Bell*, 183 U. S. 675.

In *Ryan v. Railroad Company*, 99 U. S. 382, 388, the court in speaking of the land there in contest held that "It was within the secondary or indemnity territory where that deficiency was to be supplied. The railroad company had not and could not have any claim to it until specially selected, as it was, for that purpose * * *." Later cases recognizing this doctrine have described the right of selection of indemnity lands as a power, and held that no color of title is gained until the power is exercised. *United States v. Southern Pacific Railroad Company*, 223 U. S. 565, 570. And the right is dependent upon a future contingency. *Northern Pacific Railway Company v. Lane*, 46 App. D. C. 434, 439.

It is manifest that the land sought here to be selected does not fall within the categories of section 321(b) of patented or certified land or of lands listed or selected and finally and fully approved, but it is in effect contended that they are in the class of "such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier to an innocent purchaser for value."

It is not questioned that the right of selection is a valuable property right, such a right as might be sold or encumbered (*Myers v. Croft*, 13 Wall. 291), as has been frequently done by grantee companies and would entitle the assignee to the indemnity lands within the grant, when title thereto is perfected under the grant. *Hastings and Dakota*

Ry. Co., 18 L. D. 511-518. The contract, however, to sell the lands intended to be acquired was entirely executory. The assignor had under the rulings above cited no right, interest or claim to any specific land, and therefore, could not convey any interest in them. The Secretary could not rightly find that the agreement of the railroad company to exercise its right of selection to lands thereafter to be specified was a sale of lands to a bona fide purchaser within the meaning of the statute. The railroad company elected to surrender its rights of selection by releasing the land in conformity with the provisions of the Transportation Act, and, therefore, relinquished its power to select the lands in question. See *Santa Fe Pacific Railroad Company*, 58 I. D. 577.

The decision of the Commissioner is

Affirmed.

• SANTA FE PACIFIC RAILROAD COMPANY

*Decided January 8, 1944**

RAILROAD LAND GRANTS—STATUTORY CONSTRUCTION—ACT OF JUNE 22, 1874.

The act of June 22, 1874, which gave the land-grant railroad companies an option to relinquish or reconvey to the United States lands included within the grant and in the possession of settlers whose rights arose subsequent to the rights of the railroad company and to select in lieu thereof other land within the limits of the grant, is a grant of land in aid of the construction of a railroad the same as the original granting act.

The act of June 22, 1874, is an additional grant conditioned upon the relinquishment of a portion of the original grant and the exercise of the right to select other land in lieu thereof.

STATUTORY CONSTRUCTION—TRANSPORTATION ACT OF 1940—RELEASE OF CLAIMS UNDER GRANTS OF LAND IN AID OF THE CONSTRUCTION OF A RAILROAD—CLAIMS TO LANDS NOT ARISING UNDER THE ORIGINAL GRANTING ACT.

A railroad company's release of all claims under any act of Congress to itself or to any predecessor in interest, in aid of the construction of a railroad, filed pursuant to section 321(b) of the Transportation Act of 1940, includes a claim, arising under the act of June 22, 1874, to land to be selected in lieu of land acquired under the original grant of land and such claim is extinguished by the filing of such release.

APPLICATION FOR PATENT—TRANSPORTATION ACT OF 1940—RELEASE OF CLAIMS—BURDEN OF PROOF TO ESTABLISH EXCEPTION—REGULATIONS OF DECEMBER 10, 1941.

* The Santa Fe Pacific Railroad Company brought an action to set aside the above decision, but the United States Supreme Court, by decision of February 3, 1947, held that the Secretary's decision had been "clearly right" and dismissed the complaint. *Krug v. Santa Fe Pacific Railroad Company*, 329 U. S. 591, reversing 153 F. (2d) 305, which had reversed 57 F. Supp. 984.

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Under the departmental regulations of December 10, 1941, a railroad company asserting a right to patent on the ground that the land for which patent is sought was excepted from a release filed pursuant to section 321(b) of the Transportation Act of 1940, under the innocent purchaser provision of the saving clause of this section, must show conclusively that the alleged purchaser is entitled to the estate transferred by the patent.

CHAPMAN, *Assistant Secretary*:

This is an appeal by the Santa Fe Pacific Railroad Company from the decision of the Commissioner of the General Land Office of May 15, 1943, rejecting application, Phoenix 080809, for selection of the NE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 13, T. 17 N., R. 9 $\frac{1}{2}$ W., G. & S. R. B. & M., Arizona, in lieu of the SE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 27, T. 16 $\frac{1}{2}$ N., R. 13 W., G. & S. R. B. & M., Arizona, and Phoenix 080810, for the NW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 13, T. 17 N., R. 9 $\frac{1}{2}$ W., G. & S. R. B. & M., Arizona, in lieu of the SE $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 11, T. 15 N., R. 13 W., G. & S. R. B. & M., Arizona.

The Atlantic and Pacific Railroad Company was named as grantee of a congressional land grant in aid of the construction of its railroad in the act of July 27, 1866 (14 Stat. 292). The Santa Fe Pacific Railroad Company, hereinafter referred to as the Santa Fe Company, purchased the property of the Atlantic and Pacific Railroad Company at a foreclosure sale and Congress confirmed the grant of July 27, 1866, to the Santa Fe Company by act of March 3, 1897 (29 Stat. 622). On January 15, 1917, the Santa Fe Company, acting pursuant to the act of June 22, 1874 (18 Stat. 194, 43 U. S. C. sec. 888), relinquished to the United States certain portions of this grant then occupied by settlers whose entries had already been allowed. The relinquishment was accepted and on March 2, 1917, the Commissioner of the General Land Office informed the Santa Fe Company that it had a right to select other land within the limits of the grant in lieu of the land relinquished (Miscellaneous No. 673456). This land was then unsurveyed and remained so until about 1939. The official plat of the official survey was accepted by the General Land Office on May 21, 1940.

On December 18, 1940, in accordance with section 321(b) of Part II, Title III, of the Transportation Act of 1940 (54 Stat. 954, 49 U. S. C. sec. 65), and regulations issued thereunder by the Secretary of the Interior (43 CFR 273.61-273.67), the Santa Fe Company and the Atchison, Topeka and Santa Fe Railway Company, operator of the line of railroad, filed releases which provided that each company—

* * * relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compen-

sation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

Each release stated that it did not embrace—

* * * lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad.

The releases were approved March 1, 1941.

On March 23, 1943, the Santa Fe Company filed its selection of the two 40-acre tracts in Sec. 13, T. 17 N., R. 9½ W., G. & S. R. B. & M., claiming the right to select this land in lieu of the land relinquished in 1917, in behalf of the Greene Cattle Company, Incorporated, its transferee, under the provision of the saving clause of section 321(b) of the Transportation Act of 1940, which permits patenting of lands sold to innocent purchasers for value. It also filed a petition for classification of this land as suitable for stock-watering development under section 7 of the Taylor Grazing Act. The Commissioner of the General Land Office rejected the selection on the grounds that the right of selection had been relinquished in the release of December 18, 1940; that a sale to an innocent purchaser had not been shown; and that the selected land had been withdrawn by Executive order of April 17, 1926, creating Public Water Reserve No. 107.

The Santa Fe Pacific Railroad Company has appealed, alleging that its unexercised selection right was not impaired by the release filed on December 18, 1940, for the reason that the release covered only claims under a land grant. It argues that its claim to the selected land does not arise from a land grant and, consequently, was not included in the release; that its unexercised selection right was not included in the release for the further reason that it had been sold to an innocent purchaser for value prior to the effectiveness of the Transportation Act of September 18, 1940; and that its transferee has equities in certain springs of water located on the selected land which entitle the selection to favorable consideration.

The act of June 22, 1874, was enacted for the purpose of relieving the hardships of settlers whose filing or entry on public lands had been allowed by the General Land Office under the pre-emption or homestead laws subsequent to the time when the rights of a railroad company under a congressional grant attached to the granted land. It was required because the time when the rights of the grantees in the railroad grants became vested was often uncertain and ascertained only with difficulty. The granting acts protected settlers

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whose rights attached prior to those of the grantee and permitted the grantee to replace such losses by selection from the indemnity limits of the grant. The act of June 22, 1874, permitted the grantee to relinquish land in possession of settlers whose rights arose subsequent to its own and to select an equal quantity of land within the limits of the grant not otherwise appropriated in lieu of such land, and provided that the grantee should receive title to land thus selected the same as if it had been originally granted.

The act of August 29, 1890 (26 Stat. 369, 43 U. S. C. sec. 889), gave the grantee railroad companies the same right of selection in cases wherein settlers had resided upon and improved land granted to a railroad company for a period of five years, but whose filings or entries were not of record. It has no application in this case for the reason that the entries of the settlers on the 40-acre tracts in Sec. 27, T. 16½ N., R. 13 W., and Sec. 11, T. 15 N., R. 13 W., were both of record and were patented in 1914 (Phoenix 019940 and 024256).

It is apparent that the act of June 22, 1874, contemplates a grant of land to a railroad company antedating the passage of this act. The act gives the grantee an option to relinquish a portion of land included in the earlier grant to which its rights had attached, but which was in the possession of settlers. *Harris v. Northern Pacific R. R. Co.*, 10 L. D. 264; *Southern Pacific Railroad Company*, 33 L. D. 89. If the option to relinquish is exercised, the grantee may then select other land, in lieu of the land relinquished within either the primary or the indemnity limits of the original grant. *Southern Pacific R. R. Co.*, 18 L. D. 275; *The Gulf and Ship Island R. R. Co. v. The United States*, 22 L. D. 560; *Dressel v. Oregon and California R. R. Co.*, 35 L. D. 21. It is true that the selected land contemplated by this act is land which was not granted to the railroad company in the original grant, but the act of June 22, 1874, is in itself a granting act from which arises the right to the land selected in lieu of land included in the original grant. The act specifically provides that railroad companies which exercise the option to select land in lieu of land relinquished pursuant to this act, "shall receive title" to the selected land "the same as though originally granted." This is a declaration of an additional grant in lieu of a portion of the original grant.

Further, it creates a right of the same dignity as the indemnity provisions of the granting acts. It has never been denied that claims to indemnity land arise out of the provision of the original grant which gives the grantee a contingent right to such land by permitting it to select land within the indemnity limits of the grant to replace

losses of land specifically granted. The act of June 22, 1874, gives the grantee of the original grant a right to select land within either the primary limits or the indemnity limits of the grant in lieu of losses within the primary limits which are not covered by the indemnity provisions of the original grant. The act of June 22, 1874, is, therefore, but an extension of the indemnity right previously given. The land is referred to as lieu land rather than indemnity land for the purpose of emphasizing the distinction in the occasion for exercise of the right of selection, but the act creating this right is as truly a granting act as the original act.

It is not material that the act of June 22, 1874, may have created a contract right to select land in lieu of land relinquished. The Supreme Court has held that all of the railroad land grants constituted offers to convey title to public lands to certain railroad companies who would build railroad lines, which ripened into contracts when the railroads indicated their acceptance of the offers by filing plats of the lines which they proposed to build. Under these circumstances, the existence of a contract right to select lands in lieu of land relinquished does not prove that the act under which the contract right is claimed does not constitute a grant. It suggests rather that the purpose and result accomplished by this act are the same as the purposes and results of the original granting acts.

We conclude, therefore, that the act of June 22, 1874, is a granting act and that the right to select, which the Santa Fe Company now seeks to exercise is a claim arising under that act. The release of December 18, 1940, covers any and all claims arising under "any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest," and not merely the original grant of July 27, 1866. It follows that all claims arising under the grant of 1874 were relinquished by this release.

If, as appellant contends, the right to select land in lieu of land relinquished which was bestowed by the act of June 22, 1874, is not a right which arises out of a railroad land grant and is not covered by a release filed pursuant to the Transportation Act of 1940, it is clear that it cannot be excepted from the operation of such release by the saving clauses of section 321(b) of the Transportation Act. Appellant is somewhat inconsistent in relying upon both contentions, but inasmuch as the Department has determined that the right of selection does arise under a railroad land grant and was therefore necessarily included in the release of December 18, 1940, it will consider whether or not it was excepted from the release under the second provision of the saving clause of section 321(b) of the Transportation Act, which provides:

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* * * Nothing in this section shall be construed * * * to prevent the issuance of patents confirming the title to such lands as the Secretary of the Interior shall find have been heretofore sold by any such carrier [the grantee] to an innocent purchaser for value * * *.

Appellant has recognized that the saving clause of section 321(b) does not operate automatically without any designation of land to be excepted from a release, by filing with its release in the General Land Office a list of lands and the purchasers to whom it alleged that it had sold them prior to the effectiveness of the Transportation Act. This list did not include the land in the present selection list. Further, it did not submit with its selection list, proof that the Greene Cattle Company, Incorporated, is a purchaser entitled to the estate in land claimed in the selection list which was filed instead of an application for patent. The regulations of December 10, 1941 (43 CFR 273.68-273.74), require that such proof shall be submitted with an application for patent. Appellant's claim that its right to select should be recognized under the saving clause of section 321(b) rests upon the mere assertion that the Greene Cattle Company, Incorporated, is a transferee of this right. This is insufficient to clothe it with the rights of an innocent purchaser under the Transportation Act.

In any event, the bona fide purchaser provision of the Transportation Act is not applicable to the transfer of a railroad company's unexercised right to select land. *Santa Fe Pacific Railroad Company*, 58 I. D. 577.

In view of the fact that the record shows both a relinquishment of the right sought to be exercised, in the release filed on December 18, 1940, and failure to bring the claim within the saving clause of the Transportation Act, a determination that the Greene Cattle Company, Incorporated, has equities in certain springs of water located on the land sought to be selected cannot affect the decision in this case. Accordingly, we do not examine that question.

The decision of the Commissioner is

Affirmed.

SANTA FE PACIFIC RAILROAD COMPANY

*Decided January 8, 1944**

RAILROAD LAND GRANTS—STATUTORY CONSTRUCTION—ACT OF APRIL 28, 1904.

The act of April 28, 1904, which gave the Santa Fe Pacific Railroad Company, as successor of the Atlantic and Pacific Railroad Company, an option to

* The Santa Fe Pacific Railroad Company brought an action to set aside the above decision, but the United States Supreme Court, by decision of February 3, 1947, held that the Secretary's decision had been "clearly right" and dismissed the complaint. *Krug v. Santa Fe Pacific Railroad Company*, 329 U. S. 591, reversing 153 F. (2d) 305, which had reversed 57 F. Supp. 984.

relinquish or reconvey to the United States, at the request of the Secretary of the Interior, land granted to it in aid of the construction of a railroad and to select in lieu thereof other vacant public land of equal quality in the Territory of New Mexico, is a grant of land in aid of the construction of a railroad.

STATUTORY CONSTRUCTION—TRANSPORTATION ACT OF 1940—RELEASE OF CLAIMS UNDER GRANTS OF LAND IN AID OF THE CONSTRUCTION OF A RAILROAD—CLAIMS TO LAND NOT ARISING UNDER THE ORIGINAL GRANTING ACT.

The Santa Fe Pacific Railroad Company's release of all claims under any act of Congress to Santa Fe Pacific Railroad Company or any predecessor in interest, in aid of the construction of a railroad, filed pursuant to section 321(b) of the Transportation Act of 1940, includes a claim, arising under the act of April 28, 1904, to land to be selected in lieu of land acquired under the original grant of July 27, 1866, and such claim is extinguished by the filing of such release.

STATUTORY CONSTRUCTION—TRANSPORTATION ACT OF 1940—RELEASE OF CLAIMS—SAVING CLAUSE OF SECTION 321(b)—EXCEPTIONS.

The saving clause of section 321(b) of the Transportation Act of 1940 authorizes the exception from the release of claims under the land grants of patented lands, lands sold to innocent purchasers for value and lands selected and the selection fully and finally approved by the Secretary of the Interior to the extent that the issuance of patent may be authorized by law.

STATUTORY CONSTRUCTION—TRANSPORTATION ACT OF 1940—RELEASE OF CLAIMS—SAVING CLAUSE OF SECTION 321(b)—SELECTION OF LANDS.

The final provision of the saving clause of section 321(b) of the Transportation Act of 1940 does not authorize the exception from a release of claims filed pursuant to this section of claims to land for which a selection list has been filed but not finally approved by the Secretary of the Interior.

APPLICATION FOR PATENT—TRANSPORTATION ACT OF 1940—RELEASE OF CLAIMS—BURDEN OF PROOF TO ESTABLISH EXCEPTION—REGULATIONS OF DECEMBER 10, 1941.

Under the departmental regulations of December 10, 1941, a railroad asserting a right to patent on the ground that the land for which patent is sought was excepted from a release filed pursuant to section 321(b) of the Transportation Act of 1940, under the innocent purchaser provision of the saving clause of this section, must show conclusively that the alleged purchaser is entitled to the estate transferred by the patent.

CHAPMAN, *Assistant Secretary*:

This is an appeal by the Santa Fe Pacific Railroad Company from the decision of the Commissioner of the General Land Office of June 12, 1943, rejecting its applications, Las Cruces 058331 and 058332, to select the SW $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 33, T. 7 S., R. 10 W., N. M. M., in lieu of the SW $\frac{1}{4}$ SW $\frac{1}{4}$ of Sec. 29, T. 10 N., R. 2 W., N. M. M.; and the SE $\frac{1}{4}$ SW $\frac{1}{4}$ Sec. 35, T. 7 S., R. 10 W., N. M. M., in lieu of the SE $\frac{1}{4}$

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NE $\frac{1}{4}$ Sec. 29, T. 10 N., R. 2 W., N. M. M., all in the State of New Mexico.

The Atlantic and Pacific Railroad Company was named as grantee of a congressional land grant in aid of the construction of its railroad in the act of July 27, 1866 (14 Stat. 292). The Santa Fe Pacific Railroad Company, hereinafter referred to as the Santa Fe Company, purchased the property of the Atlantic and Pacific Railroad Company at foreclosure sale and by the act of March 3, 1897 (29 Stat. 622), Congress confirmed the grant of July 27, 1866, to the Santa Fe Company. On December 26, 1911, acting pursuant to the act of April 28, 1904 (33 Stat. 556), and the regulations issued thereunder (43 CFR 273.56-273.57), the Santa Fe Company relinquished to the United States certain portions of the granted land which were then claimed by settlers. The relinquishment was approved on March 21, 1912, and by letter of May 22, 1912 ("F" 236212 CSB) the Commissioner of the General Land Office informed the Santa Fe Company that it had a right to select an equal quantity of land of equal quality within the Territory of New Mexico in lieu of the land relinquished.

On August 28, 1940, the Santa Fe Company filed its applications to select lieu lands with the register at Las Cruces, New Mexico. The register suspended the applications because of the Santa Fe Company's failure to tender the required fees and to file accompanying applications for classification of the land under section 7 of the Taylor Grazing Act (48 Stat. 1272, 43 U. S. C. sec. 315f). The filing fees were paid on October 2, 1940, and the petitions for classification were filed on October 10, 1940.

On December 18, 1940, in accordance with section 321 (b) of Part II, Title III, of the Transportation Act of 1940 (54 Stat. 954, 49 U. S. C. sec. 65) and the regulations issued thereunder (43 CFR 273.61-273.67), the Santa Fe Company, together with the Atchison, Topeka and Santa Fe Railway Company, operator of the line of railroad, filed releases which provided that each company—

* * * relinquishes, remises and quitclaims to the United States of America any and all claims of whatever description to lands, interests therein, compensation or reimbursement therefor on account of lands or interests granted, claimed to have been granted, or claimed should have been granted by any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest in aid of the construction of any portion of its railroad.

The releases stated that they did not embrace—

* * * lands sold by the company to innocent purchasers for value prior to September 18, 1940, lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940, or lands which have been patented or certified to the company or any predecessor in interest in aid of the construction of its railroad.

The releases were approved March 1, 1941.

On June 12, 1943, the Commissioner of the General Land Office rejected the selections on the ground that the release of December 18, 1940, relinquished all rights the Santa Fe Company had under the act of April 28, 1904, and refused to consider the petitions for classification because of the rejection of the selections.

In this appeal, the Santa Fe Company alleges that the release of December 18, 1940, filed pursuant to the Transportation Act of 1940, did not relinquish rights which had accrued under the act of April 28, 1904, and that it was deprived of the right to prove that the selection was protected by the saving clause of section 321 (b) of Part II, Title III of the Transportation Act applicable to innocent purchasers. Thus the appeal presents but two questions to be determined: (1) Whether or not the selection right accruing under the act of April 28, 1904, was included in the release of December 18, 1940, (2) whether or not appellant was illegally deprived of the right to show that this selection right was excepted from the release under the innocent purchaser provision of the saving clause of section 321 (b) of Part II, Title III, of the Transportation Act of 1940.

The act of April 28, 1904, provides:

That the Atlantic and Pacific Railroad Company, its successors in interest and its or their assigns, may, when requested by the Secretary of the Interior so to do, relinquish or deed, as may be proper, to the United States any section or sections of its or their lands in the Territory of New Mexico the title to which was derived by said railroad company through the Act of Congress of July twenty-seventh, eighteen hundred and sixty-six, in aid of the construction of said railroad, any portion of which section is and has been occupied by any settler or settlers as a home or homestead by themselves or their predecessors in interest for a period of not less than twenty-five years next before the passage of this Act, and shall then be entitled to select in lieu thereof, and to have patented other sections of vacant public land of equal quality in said Territory, as may be agreed upon with the Secretary of the Interior.

The enactment of this statute followed the act of March 3, 1891 (26 Stat. 861), as amended by the act of February 21, 1893 (27 Stat. 470), which recognized the validity of the claims of occupants of land within the States of Colorado, Nevada and Wyoming, and the Territories of New Mexico, Arizona and Utah, who had been in adverse possession for 20 years and permitted each of such occupying claimants to retain 160 acres of such land. The act of April 28, 1904, gave the Santa Fe Company as successor in interest of the Atlantic and Pacific Railroad Company an option to relinquish or to reconvey to the United States, at the request of the Secretary of the Interior, such portions of its lands in the Territory of New Mexico, which it had acquired under the grant of July 27, 1866, as

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had been occupied by settlers for a period of 25 years. Upon exercise of the option, the Santa Fe Company became entitled to select and to have patented to it, in lieu of the land acquired under the grant of 1866, other land of equal quality within the Territory of New Mexico.

From the foregoing, it is evident that the purpose of the act of April 28, 1904, was to reimburse the Santa Fe Company for losses in the grant of July 27, 1866, occasioned by the inability of the United States to furnish good title to lands acquired from Mexico under the treaty of Guadalupe-Hidalgo in 1848 and the Gadsden purchase of 1853 which were occupied by settlers who had entered in good faith. The Santa Fe Company exercised the option to relinquish two 40-acre tracts to which it was entitled under the grant of 1866 and thus became entitled to select and to receive patent to other land in lieu thereof. The 1904 act operated to replace losses in the original grant of 1866. Land acquired under the later act was to be substituted for land included in the grant of July 27, 1866. It cannot therefore be disputed that the grant of 1904 was in aid of the construction of a railroad.

The Transportation Act of 1940 required the land grant railroads to file releases of all claims under any grant of land to aid in the construction of a railroad, as a condition precedent to the grant of the privilege of charging the United States full rates for transportation of freight and passengers, with certain exceptions. And the release filed by the Santa Fe Company covered any and all claims under "any act of the Congress to Santa Fe Pacific Railroad Company or to any predecessor in interest," and not merely claims arising under the original grant of July 27, 1866. It follows that all claims arising under the grant of 1904 were relinquished by this release unless specifically excepted by its terms.

The release excepts only lands sold to an innocent purchaser for value prior to September 18, 1940, lands patented or certified to the company or any predecessor in interest and "lands embraced in selections made by the company and approved by the Secretary of the Interior prior to September 18, 1940." Appellant's present claim does not fit any of these categories. There is no proof that the land which the Santa Fe Company now seeks to select was ever sold to an innocent purchaser. There is no showing that patent to the land was ever issued to the Santa Fe Company. There was no approved selection prior to September 18, 1940, when the Transportation Act became effective. It is true that a selection list was offered for filing on August 28, 1940, but there was no payment of the required filing fees at that time. The application for selection was not effective until

October 2, 1940, when the filing fees were paid. (43 CFR 273.58.) But this application was not approved by the Secretary.

Clearly, in the absence of an approved selection prior to September 18, 1940, appellant has no claim against the United States to any of the lands involved. The release included all rights which the Santa Fe Company had and the right now asserted was not included in the exceptions. It is true that upon the Santa Fe Company's relinquishment of granted lands the United States became obligated to convey such lands as the Company should select in lieu thereof, but the United States incurred no obligation in the absence of a selection of the lieu land. The Santa Fe Company relinquished its right to select lieu lands in exchange for the benefits of the Transportation Act of 1940. It is now enjoying those benefits and is, therefore, precluded from insisting upon a return of the consideration. This Department is not concerned with the wisdom of the bargain that was made, but it is obliged to measure the present rights of the Santa Fe Company in the light of that bargain.

Appellant's further allegation of error that because of his decision of June 12, 1943, the Commissioner afforded it no opportunity to prove that its attempted selection was made in the interest of innocent purchasers whose rights had accrued long prior to September 18, 1940, is without merit. The assertion of this contention is a denial of appellant's first contention that the claim now asserted was not covered by the release filed on December 18, 1940, since obviously the alleged selection could be protected under the saving clause of section 321(b) of Part II, Title III, of the Transportation Act of 1940, only because it was subject to the release required by that act. The Department finds that this claim was subject to the release, but that appellant is not entitled to the protection of the innocent purchaser provision because it has not shown that it is entitled to such protection.

The regulations of December 10, 1941 (43 CFR 273.70), require that—

* * * Full details of the alleged sale must be furnished, such as dates, the terms thereof, the estate involved, consideration, parties, amounts and dates of payments made, and amounts due, if any, description of the land, and transfers of title * * *. No application for a patent under this act will be favorably considered unless it be shown that the alleged purchaser is entitled forthwith to the estate and interest transferred by such patent. * * *

Appellant has made no effort to comply with these provisions of the regulations. It merely makes the assertion in its argument on appeal that the Commissioner gave it no opportunity to offer proof that innocent purchasers' rights are involved. The Commissioner

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was not required to do so; under the regulations, the burden is upon the applicant to assert and establish such rights. Appellant failed to furnish the Commissioner with proof of sale to an innocent purchaser and has made no attempt to do so during the pendency of the appeal. The Department cannot supply such proof. Accordingly, the appeal must be determined without consideration of the rights of innocent purchasers.

The Commissioner's decision is

Affirmed.

CALIFORNIA ELECTRIC POWER COMPANY

Decided January 17, 1944

Motion for Rehearing decided August 8, 1944

PUBLIC LANDS—RIGHTS-OF-WAY—ACT OF MARCH 4, 1911—DISCRETIONARY AUTHORITY OF DEPARTMENT HEADS—VESTING OF RIGHTS—CONDITIONS OF A GRANT.

Under the act of March 4, 1911, authorizing the heads of departments having jurisdiction over public lands to prescribe the terms of the grants of rights-of-way over such lands and to refuse such grants as are incompatible with the public interest, such department heads have discretionary authority to grant or to refuse an application for right-of-way. Because the grantors have such discretion an applicant acquires no vested right in advance of the actual grant of a right-of-way and must accept the conditions of the grant defined by departmental regulations in force at the time of the grant rather than the regulations in force when the application is filed.

PUBLIC LANDS—RIGHTS-OF-WAY—CONDITIONS OF A GRANT—ACT OF FEBRUARY 15, 1901—ACT OF MARCH 4, 1911—IDENTICAL CONDITIONS.

The adoption of departmental regulations prescribing identical conditions of the grant of a revocable permit under the act of February 15, 1901, and of an easement for a fixed term of years under the act of March 4, 1911, does not reduce the grant of an easement authorized by the act of 1911 to the level of the permit authorized by the act of 1901.

RIGHTS-OF-WAY—CONDITIONS OF A GRANT—REGULATIONS OF DECEMBER 14, 1942—SECTIONS 245.21(r) AND 245.21(i)—TRANSFER OF RIGHT-OF-WAY—USE FOR POWER PURPOSES—CONDITIONAL RIGHT OF REVOCATION.

The provisions of section 245.21(r) of the regulations of December 14, 1942, which permit the Secretary of the Interior to require the transfer of a right-of-way, together with the structures and equipment of the grantee on the right-of-way lands, to the person who has previously acquired other property of the grantee which is dependent upon the use of the right-of-way for its usefulness, are not inconsistent with the concept of an easement.

The provisions of section 245.21(i) of the regulations of December 14, 1942, which require the grantee of a right-of-way to consent to the reservation by the United States of the right to use the right-of-way land for power purposes are not inconsistent with the concept of an easement.

Even the reservation of a conditional right to revoke the grant of an easement may be required when necessary for the legitimate protection of the United States.

RIGHTS-OF-WAY—CONDITIONS OF A GRANT—SECTION 6(a) OF AGREEMENT—USE OF LANDS WITHOUT LIABILITY—INCREASED COST OF IMPROVEMENTS.

The inclusion of section 6(a) in the agreement enumerating the conditions of the grant of an easement which reserves to the United States the right to use the right-of-way lands for public purposes without liability to the grantee and to require the grantee to pay any increased cost of improvements made by the United States which is occasioned by the grantee's use of the land, is reasonably required in the public interest and is justified by the same considerations which justify section 245.21(i) of the regulations.

RIGHTS-OF-WAY—CONDITIONS OF A GRANT—REGULATIONS OF DECEMBER 14, 1942—SECTION 245.21(h)—UNIFORM ACCOUNTING SYSTEM.

The provisions of section 245.21(h) of the regulations of December 14, 1942, which permit the Secretary of the Interior to prescribe a uniform accounting system for grantees of rights-of-way are a necessary means of insuring uniform reports which is within the discretionary authority of the Secretary, but because the purposes of the Department are fulfilled by the grantee's adoption of a system of accounting prescribed by the Federal Power Commission it is desirable that this section of the regulations should be qualified by a proviso that adoption of such system shall be deemed compliance with the requirement of this section.

RIGHTS-OF-WAY—CONDITIONS OF A GRANT—REGULATIONS OF DECEMBER 14, 1942—SECTION 245.21(q)—COMPLIANCE WITH STATE REGULATIONS.

The provisions of section 245.21(q) of the regulations of December 14, 1942, which require the grantee of a right-of-way over public lands of the United States to agree to comply with State regulation of service and rates is applicable only in so far as a grantee is subject to such State regulation and it is desirable that this section of the regulations should clearly express such intent.

RIGHTS-OF-WAY—CONDITIONS OF A GRANT—REGULATIONS OF DECEMBER 14, 1942—SECTION 245.21(r)—FEDERAL POWER ACT.

The provisions of section 245.21(r) which give the Secretary of the Interior a conditional right to require transfer of a right-of-way operate concurrently with the authority of the Federal Power Commission to approve sales of property in excess of \$50,000.

CONTRACTS—CONSTRUCTION.

The terms of a contract which are inconsistent with the express provisions of a statute cannot be permitted to operate in derogation of law.

RIGHTS-OF-WAY—CONDITIONS OF A GRANT—INCORPORATION OF ALL RESTRICTIONS IN ONE INSTRUMENT.

The incorporation in one instrument of all the restrictions upon the use of a right-of-way over public lands of the United States required by the various public activities administered by a number of administrative

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agencies which may be affected by the grant of a right-of-way, does not increase the conditions to which the grant is subject.

CHAPMAN, *Assistant Secretary*:

This is an appeal by the California Electric Power Company from the decision of the Commissioner of the General Land Office of January 22, 1943, requiring, as a condition of the granting of the company's application, Los Angeles 054902, for right-of-way for an electric transmission line from the west boundary of Sec. 12, T. 3 S., R. 1 E., to the south boundary of Sec. 9, T. 5 S., R. 8 E., S. B. M., across public lands and allotted and tribal lands of the Morongo Mission Indian Reservation in California, the execution of an agreement binding the company to abide by the regulations of the Secretary of the Interior set out in 43 CFR 245.20-245.21 (7 F. R. 10814-10818).

The California Electric Power Company purchased from the Metropolitan Water District of Southern California an electric transmission line which traverses certain public and allotted and tribal Indian lands in California in the sections indicated above, and on August 20, 1941, filed its application for grant of a right-of-way across said lands in accordance with the act of March 4, 1911 (36 Stat. 1253, 43 U. S. C. sec. 961). On March 17, 1942, the General Land Office forwarded the draft of an agreement which required the company to agree to the conditions upon which the grant would be made. These conditions included its promise to comply with the regulations approved by the Secretary of the Interior on October 30, 1939 (Circ. 1461, 4 F. R. 4524-4529), in its use of the right-of-way. The company refused to execute the agreement except after elimination of paragraphs (h), (q), and (r) of section 245.21 of the regulations on the ground that these provisions had no application to a right-of-way granted under the act of March 4, 1911, and applied only to permits issued under the act of February 15, 1901 (31 Stat. 790, 43 U. S. C. sec. 959).

In the decision of January 22, 1943, the Commissioner held that the revised regulations of December 14, 1942 (Circ. No. 1461a, 7 F. R. 10814-10818), are equally applicable to easements granted under the act of March 4, 1911, and permits issued under the act of February 15, 1901, so that an agreement to comply therewith is a condition precedent to approval of an application under either act. A revised agreement referring to the regulations of December 14, 1942, was returned to the company for execution. The company executed this agreement after first deleting reference to the regulations of December 14, 1942, and inserting instead a reference to the regulations of October 30, 1939; excepting from its promise of compliance, paragraphs (h), (q), and (r) of section 245.21; and eliminating all of

section 6(a) of the agreement. The General Land Office refused to accept the agreement thus modified and the company appealed. In its brief the company urged its right to the transmission line as vendee of the Metropolitan Water District which it contended had acquired title pursuant to the act of June 18, 1932 (47 Stat. 324). In a supplemental decision of March 17, 1943, the Commissioner required formal relinquishment of the rights previously granted to the Metropolitan Water District before further consideration of the application of the California Electric Power Company. The California Electric Power Company complied with this request on July 6, 1943. The Department need consider at this time only that portion of the company's appeal which relates to the decision of January 22, 1943.

Appellant alleges that the Commissioner erred in the decision of January 22, 1943, because: (1) It is entitled to the grant of a right-of-way under the conditions expressed in the regulations in force at the time of the filing of its application; (2) the regulations of December 14, 1942, permit [under paragraph (r)] a forced sale or recapture of the right-of-way by the Secretary of the Interior and [under paragraph (i)] a revocation of the grant at the election of the Secretary of the Interior in contravention of the express provisions of the act of March 4, 1911, and the settled policy of Congress, which results in reducing the easement authorized by the act of March 4, 1911, to the level of a permit authorized by the act of February 15, 1901; (3) section 6(a) nullifies the grant by reserving the whole title to the right-of-way to the United States for the purpose of preventing the grantee from interfering with the future erection of structures thereon by the United States; (4) the provisions of the regulations which require installation of an accounting system prescribed by the Secretary of the Interior [paragraph (h)], compliance with State regulation of rates and service [paragraph (q)], and sale at the direction of the Secretary of the Interior [paragraph (r)], are in conflict with the Federal Power Act and the jurisdiction of the Federal Power Commission.

1. There is no merit in appellant's first contention that it is entitled to a grant of the right-of-way applied for on August 20, 1941, under conditions prescribed by the regulations in force at the time of the filing of the application rather than those in force at the time of the consideration of the application. Appellant's contention is predicated upon the assumption that the rights acquired under the act of March 4, 1911, are initiated by the filing of the application rather than the formal grant of the right-of-way by the Secretary of the Interior. This is a consequence of its interpretation of the act of March 4, 1911, as a grant by Congress rather than an act empowering the Secretary

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of the Interior, the Secretary of Agriculture and the Secretary of War to make grants of rights-of-way.

This act was not intended to constitute an offer which becomes a completed grant when some person or association of persons signifies acceptance by using certain land for the purpose indicated by the act and filing such proofs of its power to use the land for the indicated purpose as may be required. Nor does it contemplate that the rights of the grantee shall vest at the time of the filing of an application for the grant authorized by the act, for the reason that it authorizes the head of the department having jurisdiction over the land to determine the qualifications of the applicant in conformity with the conditions enumerated in the act and the regulations issued thereunder and requires the officer charged with supervision or control of a national park, national forest, military, Indian or other reservation to approve the grant upon his finding that it is not incompatible with the public interest. Because the heads of the departments having jurisdiction over public lands and other lands are expressly authorized to prescribe regulations governing the issuance of grants authorized by this act and to refuse applications that are incompatible with the public interest, it is clear that they, not Congress, are responsible for actual grants of rights-of-way under this act.

Moreover, this is not a statute by the terms of which the heads of the departments are required to act under a mandatory direction, but one which permits the exercise of discretion in determining whether or not a grant should be made. The statute expressly states that the department head having jurisdiction over lands over which a right-of-way is sought "is authorized and empowered, under general regulations to be fixed by him, to grant easements for rights-of-way." This is clearly an authorization for the exercise of a discretionary function. *United States v. Wilbur*, 283 U. S. 414, 418.

Because the Secretary is not required to grant a right-of-way in any event, or to the first or only applicant, no vested right in a grant is acquired by the filing of an application. *Red Canyon Sheep Co. v. Ickes*, 98 F. (2d) 308, 319; *Joseph E. Hatch*, 55 I. D. 580; *City and County of San Francisco v. Yosemite Power Company*, 46 L. D. 89. The filing of an application creates no equities in favor of an applicant in the absence of an absolute right to the thing applied for. *Charles G. Carlisle*, 35 L. D. 649.

The record shows that the regulations approved October 30, 1939 (Circ. 1461, 4 F. R. 4524-4529), became effective on November 8, 1939, when they were published in the Federal Register in accordance with the provisions of 44 U. S. C. sec. 307. These regulations superseded the regulations of January 6, 1913 (41 L. D. 454, as amended August

11, 1915, 44 L. D. 335), and March 1, 1913 (41 L. D. 532). They were in force when appellant's application was filed on August 20, 1941, and remained in force until the regulations approved December 14, 1942 (Circ. 1461a, 7 F. R. 10814-10818), superseded them on December 24, 1942.

Clearly, the regulations of December 14, 1942, could not be held to operate retrospectively in the absence of unequivocal evidence contained therein of the intent that they shall so operate. *Miller v. United States*, 294 U. S. 435, 439. It cannot be doubted, however, that if these regulations are in harmony with the statute which they are intended to implement, that is, if they have any validity at all, they are applicable to all matters to which they pertain from the date of their effectiveness. Appellant had acquired no vested right to the grant of an easement by the filing of an application invoking the discretion of the Secretary of the Interior. It was entitled to nothing more than a consideration of its application when the old regulations were superseded by the new. It is evident, therefore, that if and when the application is granted, appellant will not be permitted to assent to the terms of the regulations in force at the time of the filing of the application, but must give its assent to the conditions imposed by the regulations then in force. *Swendig v. Washington Co.*, 265 U. S. 322.

Moreover, appellant's strenuous objection is futile for the reason that its assent to each of the provisions at which its specific objections are leveled, is required regardless of whether the regulations of December 14, 1942, or of October 30, 1939, be in force. Paragraphs (h), (q) and (r), phrased in identical terms, are subdivisions of section 245.21 of the regulations of both dates. The last clause of paragraph (i) of the regulations of December 14, 1942, was not a part of the regulations of October 30, 1939, but it appeared as section 5 of the standard form of agreement which was in all cases required to be executed by the grantees of a right-of-way granted under the act of March 4, 1911. Appellant's vigorous insistence upon its right to the benefit of the regulations of October 30, 1939, is without foundation; but it might be conceded without altering the problems of this appeal.

2. Appellant's second contention that the regulations approved December 14, 1942, which are applied to both the act of March 4, 1911, and the act of February 15, 1901, result in reducing the grant of an easement authorized by the act of 1911 to the level of a permit authorized by the act of 1901, is likewise without merit.

The act of 1901 authorizes the Secretary of the Interior to permit the use of 100-foot rights-of-way through public lands and reservations of the United States for a great variety of purposes, which

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include electrical transmission lines and telephone and telegraph lines, and provides that any permission given by the Secretary under the act may be revoked in his discretion.

The act of 1911, which was enacted as a part of the agricultural appropriation for the fiscal year 1912, is an exact paraphrase of the act of 1901, except that it is limited to rights-of-way for electrical transmission and telephone and telegraph lines and expressly authorizes the heads of all departments having jurisdiction over public lands to grant 40-foot rights-of-way for a fixed period not to exceed 50 years, which shall be forfeited for nonuse for a period of two years or abandonment. It further provides that any citizen, association or corporation which has previously obtained a permit under the act of 1901 for any of the purposes specified in this act may obtain the benefits of this act upon the same terms and conditions as shall be required of other applicants under this act. It is thus clearly evident that the act of 1911 was enacted for the purpose of insuring the users of certain types of rights-of-way a greater continuity of the privilege by providing that it should be extended for a fixed term and should be subject to revocation for specified causes only and not revocable in the discretion of the granting officer.

The regulations of December 14, 1942, expressly recognize this distinction between the two acts and contain nothing which in any way impairs the provisions of either act. Since both acts expressly provide that the Secretary's authority is to be exercised "under general regulations to be fixed by him," it is clear that the Secretary has authority to prescribe the procedure under which his power to issue permits and grant easements shall be exercised. The act of 1911 goes even farther and gives him authority to prescribe the terms and conditions upon which grants of easements shall be made. The regulations, as applied to this act, are, therefore, unobjectionable unless some provision therein clearly derogates from the nature of the grant specified by the statute or conflicts with terms enumerated therein.

Appellant contends that such is the effect of paragraph (r) and the last clause of paragraph (i).

Paragraph (r) requires the grantee to agree:

Upon demand in writing by the Secretary to surrender the permit to the United States or to transfer the same to such State or municipal corporation as he may designate, and to give, grant, bargain, sell, and transfer with the permit all works, equipment, structures, and property then owned or held by the permittee on lands of the United States occupied or used under the permit, and then valuable or serviceable in the generation, transmission, and distribution of power: *Provided*, (1) That such surrender or transfer shall be demanded only in case the United States or the transferee shall have first acquired such other works, equipment, structures, property and rights of the

permittee as are dependent in whole or in essential part for their usefulness upon the continuance of the permit; (2) that such surrender or transfer shall be on condition precedent that the United States shall pay or the transferee shall first pay to the permittee the reasonable value of all such works, equipment, structures, and property to be surrendered or transferred; (3) that such reasonable value shall not include any sum for any permit, right, franchise, or property granted by any public authority in excess of the sum paid to such public authority as a purchase price therefor; and (4) that such reasonable value shall be determined by mutual agreement of the parties in interest, and in case they cannot agree, by the Secretary under a rule, which, except as modified by the requirements of this paragraph, shall be the then existing rule of valuation for power properties in condemnation proceedings in the State in which the properties to be surrendered or transferred are located. But nothing herein shall prevent the United States or any State or municipal corporation from acquiring by any other lawful means the permit or the works, equipment, structures, or property then owned or held by the permittee on lands of the United States occupied or used under the permit.

Appellant charges that this paragraph is incompatible with the plain import of the act of March 4, 1911, because it permits termination of the grant of an easement for causes other than the two causes enumerated in the act. It argues that the act authorizes the Secretary to grant an easement for a fixed term of 50 years with provision for termination by the Secretary under but two conditions, nonuse and abandonment, and, that by naming only two causes for termination, Congress has excluded all others.

The statute does not require the Secretary to grant easements for periods of 50 years; it permits him to make grants for periods "not exceeding fifty years" (act of March 4, 1911, 36 Stat. 1253, 43 U. S. C. sec. 961). Hence a grant for only one year, or even a shorter period, would be in harmony with the statute. Moreover, paragraph (r) does not reserve the power to terminate a grant before expiration of the term for which it is granted; it merely permits the Secretary to require its transfer, together with the equipment and structures of the grantee on the right-of-way lands, to the person who shall previously have acquired from the grantee "such other works, equipment, structures, property and rights" of the grantee as are dependent for their usefulness upon the use of the right-of-way. The Secretary's power to require such transfer of a right-of-way is limited to instances in which it is essential to the use of property, title to which the right-of-way grantee has previously voluntarily transferred. In such case, the provisions of paragraph (r) are intended to facilitate matters by insuring that the new owner of the property may acquire the right-of-way and the improvements upon the right-of-way lands as well. In the absence of the grantee's previous commitment to such procedure, the new owner would be required to depend upon negotiation with the grantee for voluntary assignment and approval by the Secretary

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or to wait for the Secretary's declaration of forfeiture for nonuse or abandonment and the grant of a new right-of-way. An unreasonable grantee might be able to defeat these methods of acquiring the right-of-way and could thus greatly inconvenience its vendee.

The reservation by the Secretary of the authority to require transfer of a right-of-way and property used on the right-of-way lands as a condition of the grant, under the limitations and for the purposes indicated in paragraph (r) is not repugnant to the grant authorized by the act of March 4, 1911. If it could be interpreted as the reservation of a contingent right to revoke, which is all that appellant has charged, it would not be inconsistent with the concept of an easement. *Robbins v. Archer*, 147 Iowa 743, 126 N. W. 936; *Hultin v. Klein*, 301 Ill. 94, 133 N. E. 660; *Eastman v. Piper*, 68 Calif. App. 554, 229 Pac. 1002; *Rochester Poster Advertising Co. v. Smithers*, 224 App. Div. 435, 231 N. Y. Supp. 315; *Martinez v. Rocky Mountain & S. F. Ry. Co.*, 39 N. M. 377, 47 P. (2d) 903.

The last clause of paragraph (i) provides that the grantee—

* * * shall within a reasonable time following receipt of due notice from the Secretary of the Interior, modify the construction of or relocate the line covered by the permit without liability or expense to the United States, as may be necessary to allow use of the right-of-way by the United States for transmission line or other power purposes.

Appellant charges that this is a provision for the surrender of the right-of-way at the option of the Secretary of the Interior. It argues that because a strip of land 40 feet wide is obviously insufficient to accommodate two transmission lines the grantee will be obliged to surrender the grant if the United States attempts to use the land for a power line.

The purpose of this paragraph of the regulations is not to permit the United States to engage in the transmission of electrical power over routes selected and developed by the grantees of rights-of-way across the public domain, but to prevent a grantee from being able to deny to the United States any use of the right-of-way lands in connection with public power projects. The most common example of such use is an intersecting line, and the grantee will, in such case, be required under paragraph (i) to do no more than to bear the expense of procuring a few tall poles for the purpose of elevating a line erected by the United States the necessary number of feet above its own line at the place of crossing to avoid interference in transmission of power. Under more unusual circumstances where a diagonal crossing may be necessary, the grantee will be obliged to relocate its line for a few hundred feet to accommodate the United States. Numerous incidents in the past, when vast projects conceived in the interest of

the public welfare have been hindered by the existence of private rights arising from unrestricted Government grants, have demonstrated the wisdom of avoiding conflicts by restriction of such grants. Hence, the language of the last clause of paragraph (i) was made sufficiently broad to include in its scope not only the case of an intersecting line but also any legitimate use for power purposes for which the United States might require right-of-way lands held by a private grantee. There is nothing inconsistent with the concept of an easement in the reservation of a right in the grantor to use the land affected by the easement so that the grantee does not acquire an exclusive right to use the land. *Campbell v. Kuhlmann*, 39 Mo. App. 628; Jones, *Easements*, sec. 379.

Furthermore, because the act of March 4, 1911, gives the Secretary authority to prescribe the terms and conditions upon which grants of rights-of-way shall be made, paragraph (i) is not inconsistent with the statute under which the grant is made even though it is conceivable that under very unusual circumstances appellant may be required to abandon its use of the right-of-way because of the paramount need of the United States for exclusive use of the land. The Secretary is not required to grant an easement merely because an application is filed, but is permitted to exercise discretion and to prescribe the conditions under which a grant will be made. So long as these conditions are required for the legitimate protection of the United States, appellant has no ground for objection. If appellant is unwilling to agree to the conditions imposed, it may withdraw its application for the grant.¹

3. Section 6(a) of the agreement which appellant has been asked to execute reserves to the United States the right to use the land affected by the right-of-way for dams, dikes, reservoirs, canals, wasteways, laterals, ditches, telephone and telegraph lines, electric transmission lines, roadways and appurtenant irrigation structures, without cost or liability for damage to improvements or activities of the grantee, and the right to require the grantee to pay the increased cost of any improvement or structure made by the United States if caused by the grantee's improvements or activities on the land. This section is designed to prevent interference with departmental functions on lands, the use of which the Secretary may grant to private persons, and is inserted in contracts of this nature which involve reclamation lands, as does the proposed contract in this case, in order that grants of rights-of-way may not create rights which

¹ See letter of Commissioner of General Land Office to M. O. Leighton, approved by Assistant Secretary, dated March 3, 1943.

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may hinder, delay or increase the costs of public projects which require public use of the same land. It includes any public use of land by the United States, without regard to the type of activity to which the enumerated structures are incidental. The importance of the services performed by the United States in the use of such structures demonstrates that it is not unreasonable to deny a grantee of a right-of-way exclusive rights in a small strip of land which could be utilized by him to hinder the development of huge areas that are essential to the well-being of thousands of people.

This provision does not amount to a reservation of "the whole title to the granted right-of-way," or subject the grantee to the possibility of becoming a trespasser by continuing to use the right-of-way, since it is justified by the same considerations which justify the inclusion in the regulations of the last clause of paragraph (i).

4. Appellant's contention that the regulations of December 14, 1942, are in conflict with the Federal Power Act and infringe upon the jurisdiction of the Federal Power Commission arises from a misconception of the import of the provisions of the regulations to which this criticism is directed.

Paragraph (h) requires the grantee to agree:

On demand of the Secretary to install a system of accounting for the entire power business in such form as the Secretary may prescribe, which system as far as is practicable will be uniform for all permittees, and to render annually such reports of the power business as the Secretary may direct.

Appellant argues that because it is an interstate power company and therefore subject to the jurisdiction of the Federal Power Commission it should not be required to comply with paragraph (h) since this will require it to keep two systems of accounts, one for the Federal Power Commission and a second for the Department of the Interior at an additional cost of \$100,000. Appellant reasons that it is inconceivable to suppose that this paragraph contemplates that the Secretary may require the same system as the Federal Power Commission requires and that this is evidenced by the fact that the regulation was adopted subsequent to the enactment of the Federal Power Act² which authorized the Federal Power Commission to prescribe the methods of accounting to be used by power companies under its jurisdiction.

Appellant is mistaken both as to the purpose and the history of this provision. Section 18 of the regulations of January 6, 1913,³ which applied to the act of March 4, 1911, provides:

² Act of August 26, 1935 (49 Stat. 847, 16 U. S. C. sec. 825).

³ 41 L. D. 454.

The grantee shall maintain a system of accounting for his entire power business in such form as the Secretary of the Interior may prescribe and shall render annually such reports of the power business as the said Secretary may direct.

The same requirement is found in paragraph (H) of section 14 of the regulations of March 1, 1913,⁴ which applied to the act of February 15, 1901. Both of these regulations antedate the Federal Power Act. Hence, it is clear that the inclusion in the present regulations of a provision permitting the Secretary to prescribe accounting systems does not indicate an intent to require something different from the requirements of the Federal Power Commission, merely because these regulations were promulgated after the enactment of the Federal Power Act.

Reports of the business done by grantees of rights-of-way have been required for the purpose of assisting the Department in determining the value of power plants located on public lands and the volume of business done over transmission lines on public lands, which information is used in fixing the charges to be made for such use of public lands. Uniform systems of accounting are merely a means of insuring uniform reports. The same reasons which induced the adoption of such practice now impel its retention.

Because appellant is an interstate power company subject to the jurisdiction of the Federal Power Commission, it has been required to adopt a system of accounting prescribed by the Federal Power Commission for utilities within its jurisdiction.⁵ It is apparent, therefore, that there is no occasion for the Secretary of the Interior to require appellant to use another system for the purpose of insuring uniformity among grantees of rights-of-way which are subject to Federal jurisdiction, since in this instance the purpose of paragraph (h) has been fulfilled by the adoption of the system prescribed by the Federal Power Commission.

It would hardly be feasible, however, to omit from the agreement a provision permitting the Secretary to prescribe the accounting system of the grantee even under these circumstances, because of the possibility that the right-of-way may be assigned to an intrastate power company pursuant to paragraph (r). But because the Federal Power Commission has prescribed uniform accounting systems for public utilities subject to its jurisdiction, which this Department has recognized as fulfilling the requirements of paragraph (h) and because the Department has no desire to require a different system even for intrastate companies, there is no reason why appel-

⁴ 41 L. D. 532.

⁵ Act of August 26, 1935, section 301 (49 Stat. 847, 854, 16 U. S. C. sec. 825).

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lant could not be protected by the insertion in the agreement of a stipulation that the adoption of a system of accounting prescribed by the Federal Power Commission shall constitute compliance with this provision of the regulations. It is likewise desirable that this proviso be added to paragraph (h) so that it may clearly define the exact limits within which the Secretary's authority to prescribe accounting systems will be exercised.

Paragraph (q) which requires compliance with State regulations of rates and service is undoubtedly of very limited application in this instance. To the extent that appellant is an interstate utility over which the Federal Power Commission has jurisdiction to the exclusion of any State commission, it is not subject to State regulation. The provisions of paragraph (q) are intended to safeguard the full extent of the jurisdiction of State agencies engaged in the regulation of public utilities. Since this jurisdiction is applicable to intrastate utilities, it is clear that paragraph (q) is intended merely to preserve State jurisdiction over intrastate utilities. By requiring the grantee of a right-of-way over lands of the United States to agree to comply with State regulation of service and rates, paragraph (q) precludes the possibility that a grantee may attempt to avoid State regulation on the ground that it has accepted the grant of a right-of-way from the Secretary of the Interior, has thereby agreed to the terms and conditions set forth in the regulations of the Department of the Interior which govern acquisition and use of rights-of-way and that this subjection to Federal regulation releases it from State regulation. The departmental regulations to which a grantee of a right-of-way agrees are incidental to the grant and do not constitute Federal regulation over the grantee which relieves it from State regulation.

It would be inadvisable to require the Land Office to execute an agreement with each grantee which is specifically applicable to that grantee because of the time which would be required to discover the individual characteristics of each grantee and because it would defeat the purpose of paragraph (r) by rendering the terms of the grant inapplicable to a transferee not possessing the same characteristics as the grantee. There is no reason, however, why the language of paragraph (q) cannot be revised to say precisely what it means; namely, that submission to departmental regulations applicable to the grantee of a right-of-way over lands of the United States shall not relieve the grantee of the necessity of submitting to State regulation to which it may be subject. Appellant's fears in this regard can thus be allayed.

There is no justification for appellant's fear of conflict between paragraph (r) and the provision of the Federal Power Act⁶ which requires the Federal Power Commission to approve the sale by public utilities within its jurisdiction of any part of their facilities valued in excess of \$50,000. Appellant assumes that under paragraph (r) the Secretary of the Interior reserves authority to demand transfer of portions of its lines in derogation of the authority of the Federal Power Commission. There is nothing in paragraph (r) which gives the Secretary authority to require the sale of appellant's transmission lines generally. This paragraph of the regulations merely permits the Secretary to require transfer of a right-of-way granted by him, and of the grantee's property on the right-of-way lands, if and when the grantee has already transferred other property which can be used advantageously only in connection with the right-of-way and the property of the grantee located on the right-of-way lands. It is clear that the grantee is obliged to obtain approval of the Federal Power Commission before it makes any sale of property in excess of \$50,000 and this includes a sale or transfer required by the Secretary under paragraph (r). Should the Secretary exercise his authority under that paragraph, the required consent of the Commission should also be or have been obtained. The regulations of the Commission governing procedure for obtaining its approval of the sale of facilities of a public utility specifically recognize the necessity for action by State and other Federal agencies with respect to such sale. (Rules of Practice and Regulations, June 1, 1938, sec. 33.2, par. O.) We see no basis for incompatibility between the requirement for consent of the Federal Power Commission and the exercise of the Secretary's authority under paragraph (r). Appellant should not be excused from the necessity of agreeing to be bound by this provision of the regulations merely on the ground that it is subject to the jurisdiction of the Federal Power Commission.

Even if the terms of paragraphs (r) and (q) were such as to indicate a definite inconsistency with the Federal Power Act, they could not be regarded as overriding express provisions of this statute since the terms of all contracts are presumed to be made in contemplation of existing laws (*Brine v. Hartford Fire Insurance Company*, 96 U. S. 627), and are to be construed in harmony therewith. *Flagg v. Sloane*, 135 Calif. App. 334, 26 P. (2d) 874; *General Paint Corporation v. Seymour*, 124 Calif. App. 611, 12 P. (2d) 990.

The Department believes that appellant's objections to the incorporation of the regulations of December 14, 1942, in the agreement set-

⁶ Act of August 26, 1935, section 203 (49 Stat. 847, 849, 16 U. S. C. sec. 824b).

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ting forth the conditions upon which a right-of-way will be granted to it are the consequence of its misconception of their import and purpose. These regulations, which are made a part of the contract setting forth the conditions under which rights-of-way are granted, are a compilation of all the restrictions, agreements and reservations which are required of a grantee under existing laws administered by numerous agencies. Thus each of the different agencies which is or may be affected by the grant of a right-of-way across public lands is relieved of the necessity of negotiating a separate contract with the grantee of a right-of-way. The grantee is required to execute one instrument which incorporates all of its agreements, but it is not required to make any greater commitments than if its agreements with all of the administrative agencies were contained in a number of instruments.

Except for the modifications of the agreement which have been indicated, the decision of the Commissioner of January 22, 1943, is affirmed, and the case is remanded for further proceedings in conformity with this decision.

Remanded.

MOTION FOR REHEARING

On January 17, 1944, this Department affirmed the decision of the Commissioner of the General Land Office requiring the California Electric Power Company to give its promise to comply with departmental regulations and certain stipulations required by the Department as a condition of the grant of a right-of-way across certain public lands and Indian lands in California. This decision pointed out that the language of certain paragraphs of the regulations to which the company had offered specific objections is somewhat broader than the actual practice of the Department thereunder and after stating the actual extent of the authority which will be exercised in each instance, indicated that the agreement to be executed by the company will limit the application of the regulations to the same extent. The company has filed a motion for rehearing, objecting to certain portions of the decision and offering its own amendments to the provisions of the regulations in controversy. While the necessary amendment of the regulations will be effected before appellant is asked to execute an agreement embodying their provisions, it is hardly advisable to incorporate therein all of the provisions which appellant proposes. Appellant's objections and proposed amendments are discussed herein in the order in which the same topics were discussed in the departmental decision of January 17, 1944,

and the precise nature of the changes to be made is indicated in each case.

The applicable regulations. Appellant disputes the departmental holding that an applicant acquires no vested interest in the grant of a right-of-way by the filing of its application, asserting that if it does not, then the Secretary may amend the regulations after an application is filed and impose entirely different conditions upon each grantee, thus destroying the uniformity which Congress required by its authorization of "general regulations" (36 Stat. 1253, 43 U. S. C. sec. 961). To state appellant's argument is to answer it. Because general regulations are prescribed by statute, it follows that the Secretary cannot at any given time offer different conditions for each grant of a right-of-way. In any event, appellant's contention is without merit for the reason that the paragraphs of the regulations to which it objects were included in the regulations in force when its application was filed on August 20, 1941, as well as when the application was considered. The revision of the regulations applicable to rights-of-way was in progress in 1938. It was completed and the regulations were approved on October 30, 1939. They were filed on November 7, 1939,¹ and became effective as of that date.² These regulations, which were specifically applicable to grants of rights-of-way under both the act of February 15, 1901, and the act of March 4, 1911, included paragraphs (h), (q) and (r) of the present regulations. Appellant is in error in its statement that these regulations applied only to permits issued under the act of February 15, 1901. See Circ. No. 1461, 4 F. R. 4524, in which their applicability is specifically described. Likewise, the last clause of paragraph (i), while not included in the regulations, nevertheless appeared as section 5 of the standard form of agreement which all grantees of rights-of-way under either the act of February 15, 1901, or the act of March 4, 1911, were required to execute at the time when appellant's application was filed. Thus all of the provisions of the agreement to which appellant has objected were in force and applicable to grants under the act of March 4, 1911, when appellant's application was filed. It is, therefore, immaterial that the regulations were amended in other respects before appellant's application was considered.

Paragraph (r). Appellant strenuously disputes that portion of the decision which upholds paragraph (r) of section 245.21 of the regulations. It first argues that the problem presented by paragraph

¹ 4 F. R. 4524.

² Act of July 26, 1935 (49 Stat. 502, 44 U. S. C. sec. 307).

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(r) is academic; that it seriously doubts that paragraph (r) has ever been employed in the forced sale of a right-of-way or other property. The existence of such doubt should afford some basis for dispelling appellant's fear of the consequences of its agreement to be governed by this provision.

Appellant proceeds, however, to argue that the Secretary of the Interior is precluded from requiring the transfer of a right-of-way and the improvements thereon to a public agency other than one which has designated itself by a prior purchase of other property of the grantee of the right-of-way even though paragraph (r) commences with a reference to any such agency as the Secretary may designate. This is a correct conclusion. It is, in fact, the only conclusion permitted by paragraph (r). The introductory clause must be read in the light of the proviso which follows immediately thereafter. This proviso limits the exercise of the Secretary's authority to instances in which the transferee has previously acquired other property of the grantee of which the right-of-way is an essential part. There is not the slightest ambiguity in this language and consequently there is no need for clarification. The Secretary cannot require a transfer of a right-of-way except to the purchaser of other property belonging to the grantee of which the right-of-way is an essential element.

Appellant further argues that it is unnecessary to divide the sale of the property to which the right-of-way is essential and the transfer of the right-of-way and the improvements thereon into two separate transactions. The Department has no quarrel with this conclusion since the existence of a binding contract for the sale of other property is sufficient to permit the operation of paragraph (r). It is true, however, as the decision of January 17, 1944, points out, that the Secretary's authority to require transfer of the right-of-way and the improvements is limited to cases in which there is a sale of the other property. The whole purpose of paragraph (r) is to prevent the seller from retaining the right-of-way after the property to which it is essential has been transferred. The Secretary's possession of the power to compel such transfer is probably sufficient to insure the orderly transfer of the right-of-way and the improvements with the other property in all but very unusual cases; that is, the knowledge that this paragraph can be invoked may well be sufficient to accomplish the purpose for which it was devised, and the transfer contemplated by this paragraph can be effected with the transaction to which it is ancillary.

Appellant is correct in assuming that the provisions of paragraph (r) are applicable whether the transfer of property which is de-

pendent for its usefulness upon the right-of-way and the improvements on the right-of-way lands was effected voluntarily or by condemnation or other involuntary proceedings. The reference in the departmental decision of January 17, 1944, to a voluntary transfer of property was inadvertent and erroneous. The provisions of paragraph (r) are intended to facilitate acquisition of rights-of-way over public lands and the improvements on such right-of-way lands when such acquisitions cannot be effected as a result of negotiation or by condemnation proceedings. Such condition may be found to exist when a publicly owned power agency condemns other property of a private power company.

Appellant complains that paragraph (r) "operates in only one direction; that is, in acquisitions by a public agency, never in acquisitions by a private company even from another private company," and that the object of the paragraph is, therefore, to promote public ownership of power works. It is indeed the function of this provision of the regulations to prevent embarrassment to the United States or to a State or municipal power company which might arise from an unrestricted grant to a private company of a right-of-way over public lands, but it does not follow that it is intended to discriminate against privately owned power companies. The statute which authorizes the Secretary to grant rights-of-way over public lands and reservations permits him to impose conditions appropriate for the protection of the public interest in such lands. Hence, the provisions of paragraph (r) are properly restricted in their application to the United States, and to States and municipal corporations engaged in the development and transmission of electrical power. The congressional policy of giving preference to public agencies in power transactions is explicitly recognized in the Federal Power Act (41 Stat. 1063, 1071), as amended August 26, 1935 (49 Stat. 838, 844, 16 U. S. C. sec. 807), the Reclamation Project Act of 1939 (53 Stat. 1187, 1194, 43 U. S. C. sec. 485h(c)), the Tennessee Valley Authority Act of 1933 (48 Stat. 58), as amended August 31, 1935 (49 Stat. 1075, 1076, 16 U. S. C. sec. 831k-1), the Bonneville Project Act (50 Stat. 731, 733, 16 U. S. C. sec. 832c), and the Fort Peck Project Act (52 Stat. 403, 405, 16 U. S. C. sec. 833c). The provisions of paragraph (r) of the right-of-way regulations of the Department adopt the same policy. They are regarded as proper, reasonable and necessary for the protection of the public interest and will be retained without modification.

Appellant's fear that the sale of any property to a publicly owned power company would permit the purchaser to apply for a forced transfer of an unrelated right-of-way and the improvements thereon

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is unjustified. If the transfer is a voluntary transaction, it is always within the power of the seller to describe clearly in the contract of sale precisely what is to be sold. The inclusion of a precise definition of the property to be transferred in the contract of sale would constitute adequate protection against the purchaser's attempt to obtain a forced transfer of a right-of-way under a spurious claim of its relation to other property. In case of honest doubt of the parties as to the relation of the right-of-way and the improvements thereon to other property which constitutes the subject matter of a contract of sale, the Secretary will have authority to decide under the terms of paragraph (r) which permit him to require surrender of the right-of-way to the United States or transfer of a right-of-way and the improvements thereon to a State or municipal corporation which shall have first acquired properties "dependent in whole or in essential part for their usefulness" upon the right-of-way. This is necessarily true whether the transfer of other property is accomplished by means of voluntary sale or by exercise of the power of eminent domain, although it is undoubtedly true that the provisions of paragraph (r) were intended to be applicable in instances wherein a transfer is effected by condemnation proceedings.

A further objection that the absence of any time limit upon the application of paragraph (r) makes it applicable for the entire term of a grant of a right-of-way and even to a subsequently acquired grant is without merit. Appellant apprehends all manner of horrible possibilities which might result from demands for transfer of rights-of-way acquired years after the sale of other property, but since in its own revised draft of this paragraph it fails to include any time limit it is apparent that this objection is not to be taken seriously.

Appellant's objection to the Secretary's authority to fix the price to be paid by the transferee is also without merit. Paragraph (r) plainly states that the Secretary may act in this regard only if the parties cannot agree upon the reasonable value of the right-of-way and the improvements and restricts the Secretary in his determination of value, except for certain modifications, to the rule applicable in condemnation proceedings. Under the conditions and restrictions thus imposed upon the Secretary's authority, appellant's fear of oppression is groundless. Indeed, the Secretary's authority is never applicable if the parties agree.

Appellant's final argument that the Department is attempting under the guise of regulations to choose the class of utilities to which it will grant rights-of-way and possibly to restrict such grants to State and municipal corporations is answered by appellant's own observation that the statute provides for such grants to "any citizen, associa-

tion, or corporation of the United States" which intends to exercise the right-of-way for one or more of the purposes previously enumerated in the statute. It is clear then that appellant's fears in this regard are without justification. The departmental decision pointed out that the right to require a surrender or transfer of the right-of-way is not inconsistent with the concept of an easement. It follows that paragraph (r) does not exceed the authority conferred upon the Secretary by the statute which authorizes him to grant easements for rights-of-way. Past inconvenience to the public occasioned by the assertion of private rights to the exclusive use of public lands has indicated the wisdom of denying exclusive rights to grantees of rights-of-way and so justifies the inclusion of paragraph (r) in the regulations. The Department is satisfied with the present form of this portion of the regulations and is not agreeable to the adoption of appellant's proposed revision of paragraph (r).

Paragraph (i). Appellant has indicated its willingness to comply with the requirements of paragraph (i) of section 245.21 of the regulations if the right of the United States to use the right-of-way lands shall be limited to the erection and maintenance of intersecting transmission lines. The decision of January 17, 1944, makes no such concession, but points out that this paragraph expressly reserves the right to use the land for transmission lines *or other power purposes*. The purpose of paragraph (i) cannot be served by the reservation to the United States of nothing more than crossing rights for the reason that necessary public use of lands over which a grant of a right-of-way has been made may exceed the construction and maintenance of intersecting lines. Paragraph (i) requires the grantee to agree that it will permit the United States to use the right-of-way lands for power purposes even though such use will result in inconvenience or increased costs to itself, which is only a denial of exclusive use by the grantee to the detriment of public interests. Experience has demonstrated the wisdom of such restriction upon grants to private companies and there is no merit in appellant's request for modification.

Section 6 (a). The departmental decision of January 17, 1944, indicates that section 6(a) of the agreement which appellant has been asked to execute is included in all right-of-way agreements which involve lands withdrawn for reclamation purposes and that its purpose is to prevent interference with the development of such lands by the Department. In its letter of November 5, 1943, appellant stated that it had sold a portion of its transmission line to Imperial Irrigation District of El Centro, California, and requested that its application for right-of-way be amended by deleting from it the portion of

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the line which has been sold. Accordingly, the application is considered as amended and withdrawn by the letter of November 5, 1943, to the extent of the right-of-way for the transmission line from the west line of Sec. 3, T. 3 S., R. 4 E. (station 981 + 26.1), to the south line of Sec. 9, T. 5 S., R. 8 E. (station 2481 + 21.4), S. B. B. & M., shown on the detail maps designated as sheet 1 of 2 and sheet 2 of 2. Appellant describes the portion of the line to be withdrawn from its application as beginning at station 1033 + 84.3 in Sec. 3, T. 3 S., R. 4 E., S. B. B. & M., but because this station is not indicated on the maps filed with the Department and because the whole of Sec. 3 is patented land over which the United States has no jurisdiction to grant a right-of-way, the station located on the west line of Sec. 3 has been selected as the location of the west end of the portion of the line to be withdrawn from the application.

The Bureau of Reclamation has reported that the land covered by the amended application for right-of-way is so located that it will not interfere with any present or contemplated project of that bureau. Accordingly the appellant will not be required to agree to the stipulation contained in section 6(a).

Paragraph (h). Appellant has indicated its willingness to comply with paragraph (h) of section 245.21 of the regulations after receiving the assurance that the keeping of a system of accounts prescribed by the Federal Power Commission will be accepted in fulfillment of the obligation imposed by this paragraph, but offers as a clarifying amendment to paragraph (h) the provision that the keeping of a system of accounts prescribed by any Federal regulatory agency shall be acceptable. As was indicated in the decision on appeal, the Department has not committed itself to the acceptance of accounting systems except those prescribed by the Federal Power Commission. Since appellant's present accounting system is prescribed by the Federal Power Commission and it is not affected by the requirements of any other Federal agency, it is not in a position to demand the concession upon which it is insisting. The attitude of the Department indicated in the decision adequately protects appellant's interests. The additional provision in appellant's proposed amendment which extends the applicability of paragraph (h) to "any successor or assign" of a grantee is unacceptable for the reason that in any case of a transfer of a right-of-way, the Department requires a new agreement embodying the conditions under which the transferee is to enjoy the privilege of a right-of-way. Appellant must agree to install such system of accounting as the Secretary may prescribe; provided, that the adoption of a system of accounting prescribed by the Federal Power Commission shall constitute compliance with this requirement.

Paragraph (q). Appellant has indicated its willingness to accept the terms of paragraph (q) of section 245.21 of the regulations as interpreted in the departmental decision of January 17, 1944. Accordingly, this paragraph of the regulations will be amended so that it provides that the grant of right-of-way by the Secretary of the Interior and compliance with departmental regulations and requirements imposed as conditions of the grant shall not relieve the grantee from such reasonable regulation of the service rendered and to be rendered by the grantee to consumers of power furnished or transmitted by the grantee, and of the price to be paid therefor as may from time to time be prescribed by the State or designated agency of the State in which the service is rendered.

The original decision will be modified as indicated herein. In all other respects the motion for rehearing is denied.

So Ordered.

AUTHORITY OF THE TRIBAL COUNCIL OF THE CONFEDERATED SALISH AND KOOTENAI TRIBES OF THE FLATHEAD RESERVATION TO INSIST UPON DISTRIBUTION OF A PER CAPITA PAYMENT ON THE BASIS OF A ROLL OF THE TRIBE APPROVED ON JANUARY 22, 1920

Opinion, February 1, 1944

INDIAN TRIBES—PER CAPITA PAYMENTS—FLATHEAD RESERVATION—TRIBAL ROLLS
—INDIAN REORGANIZATION ACT OF JUNE 18, 1934.

The tribal council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation may not insist upon distribution of a per capita payment, arising from funds accruing to the tribe subsequent to its organization under the act of June 18, 1934 (48 Stat. 984), upon the basis of the 1920 roll.

INDIAN TRIBES—TRIBAL ROLLS—ACT OF MAY 25, 1918—ACT OF JUNE 30, 1919—
SEGREGATED AND INDIVIDUALIZED FUNDS—REPEAL BY ACT OF JUNE 24, 1938,
OF AUTHORITY FOR SEGREGATION.

The 1920 roll was prepared pursuant to the provisions of section 28 of the act of May 25, 1918 (40 Stat. 591, 25 U. S. C. A. sec. 162), and the act of June 30, 1919 (41 Stat. 9, 25 U. S. C. A. sec. 163). Rolls made pursuant to the 1919 act are required to be used only for the completion of the distribution of such funds as have been segregated under the 1918 act and remain undistributed. Those acts grant no personal interest to any individual Indian in the common or communal funds of any tribe.

The roll of 1920 must be regarded as controlling only for the purpose of making payment to enrollees whose names appear on that roll, or to their heirs or legatees, of the shares of any tribal funds which have been segregated and individualized pursuant to the act of 1918.

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The utility of the roll of 1920 for the purpose of such a segregation was destroyed by the repeal, by section 2 of the act of June 24, 1938 (52 Stat. 1037), of the authority for such a segregation.

INDIAN TRIBES—DETERMINATION OF MEMBERSHIP—ACT OF JUNE 18, 1934—PER CAPITA PAYMENTS—VETO POWER OF TRIBAL COUNCIL.

By the act of June 18, 1934, *supra*, Congress affirmatively recognized the rights of Indian tribes who accepted its provisions to determine their membership for all tribal activities.

The Flathead Tribe voted to accept the provisions of the 1934 act and has organized and adopted a constitution thereunder. That constitution prescribes definite rules of membership and is thus determinative of those who are entitled to share in the distribution of tribal property.

Under the provisions of the act of June 18, 1934, and the provisions of the tribal constitution, the tribal council has the privilege of approving or vetoing the per capita payment authorized by the Secretary of the Interior.

If the council approves the per capita payment, distribution thereof must be based on a constitution roll to be adopted by the council.

PER CAPITA PAYMENTS—REFERENDUM—TRIBAL FUNDS IN U. S. TREASURY.

Article VI, section 1(h), of the tribal constitution requires approval by a popular referendum of appropriations by the tribal council of "available applicable tribal funds" in excess of \$5,000. Since the funds in question are funds in the Treasury of the United States, they are not available for appropriation by the tribal council and, therefore, section 1(h) of Article VI is without application.

HARPER, *Solicitor*:

This will refer to your [Commissioner of Indian Affairs] memorandum of September 17 relating to a per capita payment to the Flathead Indians which the Secretary authorized to be made on April 9, 1943. You request further consideration and interpretation of the memorandum addressed to you on August 20 by this office and you raise two questions with respect to Resolution No. 337 adopted on September 25, 1942, by the tribal council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation.

The pertinent provisions of the resolution for the purposes of this memorandum are as follows:

WHEREAS, the Confederated Tribes of the Flathead Reservation receive a substantial revenue annually from the rental of its power sites, which income accrues to the credit of the Tribe in the United States Treasury, and

WHEREAS, the Tribal Council believes that the best interests of the Tribe will be served by instituting a program of social and economic improvement and advancement of the Tribe, Now, Therefore

BE IT RESOLVED, by the Tribal Council of the Confederated Salish and Kootenai Tribes of the Flathead Reservation in special meeting assembled on September 25, 1942, that the following items be and are hereby approved:

Section 1. A payment of twenty-five dollars per capita shall hereafter be made annually to the Indians on the Flathead Annuity Roll as approved January 22, 1920, and maintained current under approved regulations, said payment to be made on the first day of March, or as near such date as may be practicable, from tribal funds deposited in the United States Treasury to the credit of the Confederated Salish and Kootenai Tribes. The accrued balances of such funds, after such per capita payments have been made, shall be made available for, and shall be used under a general welfare program devoted to the social and economic improvement and advancement of the members of the tribe, and including the expenses of administering such programs.

Section 2. It is hereby determined and established that for the division and distribution of tribal monies or other interests or assets, the annuity roll approved January 22, 1920, and maintained current under approved regulations, shall be used for determining the eligibility to participate in any such distributions.

Section 3. Any member of the Confederated Salish and Kootenai Tribes, of less than one-half Indian blood, who is carried on the annuity roll, or any heir of such Indian, the heir being less than one-half Indian blood, may surrender his or her tribal interests and membership, with the approval of the Tribal Council and the Federal Government, provided that any cash settlement for such surrender of tribal interests and membership shall not exceed seven hundred fifty dollars for a full share. Funds made available under Section 1 of this act may be used for the purchase of such interests.

Section 4. The surrender of interests as provided in Section 3 by any member, shall release forever the Confederated Salish and Kootenai Tribes and the Federal Government from any future responsibility or indebtedness of any sort to such Indian as an Indian and to any descendant of such Indian as an Indian.

Section 5. The Secretary of the Interior is hereby requested to obtain Congressional legislation to effectuate this act, provided that before such legislation is submitted to Congress for action, it shall be subject to review by the Flathead Tribal Council.

On April 9, the Department approved—

a per capita payment of \$25 to the recognized members of the Flathead tribe of Indians, as determined by Article II of the tribal constitution, who are alive on the date of this authority (3360 more or less).

In the letter containing departmental approval, it was further stated:

The resolution of September 25, 1942, requesting that a distribution be made annually to the Indians listed on the Flathead annuity roll approved January 22, 1920, cannot be accepted as being in conformity with the tribal constitution and the conclusions of the Solicitor of the Department, who in his opinion dated May 17, 1941, stated, "the membership of the tribe, as determined by the tribal constitution, governs all use and distribution of tribal property."

Should the Council of the tribe desire to prepare a roll at this time making payment to those whose membership is not questioned and leaving an opportunity for later determining the status of those who were born since the adoption of the constitution and whose status is uncertain because of a question of residence, such action would be approved. A supplemental roll could then be prepared for the new-born and those whose status is questioned, * * *.

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The principal objection made by this office to the distribution authorized on April 9, 1943, was that tribal consent to the distribution had not been obtained. The tribe authorized distribution to those "on the Flathead Annuity Roll as approved January 22, 1920, and maintained current under approved regulations." The Department authorized distribution "To the recognized members of the Flathead Tribe of Indians, as determined by Article II of the Tribal Constitution, who are living on the date of this authority (3,360 more or less)."

You now argue that the resolution of the tribal council, as you construe it, gives the necessary consent for the distribution. You construe the words "and maintained current" to mean "the elimination of those who have died and the addition of those who were born since 1920." The attached files show very definitely that the council did not intend such a construction to be put on its resolution and that your office did not so construe it until your present memorandum. On September 30, 1942, shortly after its adoption, Mr. Holst of your office, who was at that time at the agency, reported with respect to Section 2 of the resolution:

The Council was informed that this roll could be opened and a living roll prepared in lieu thereof, but they did not desire that. There are 2,543 names on this roll representing the living members of the tribe as of January 22, 1920. Seven hundred seventy-seven of these annuitants are dead but their heirs share in proportion to their inheritance, thus maintaining the 2,543 annuity shares. This roll has been kept current and was used in the per capita distribution of March, 1942. It has Department approval and has been accepted for 22 years. There are very few objections to it. To build up a new roll of economic members would be a most difficult undertaking and would result in interminable claims and counter claims.

With respect to Section 3 he stated:

There are 552 Indians whose names are on the 1920 roll who have permanently left the Reservation—have been away more than five years. Of these non-residents, 440 are of $\frac{1}{4}$ or less Indian blood. Also, there are many such on the Reservation who desire to give up their tribal affiliations and interests. In general, they are those of little Indian blood. This desire to get away provides an opportunity for a voluntary purge of the roll. The annual \$25 is about all those who voluntarily leave the Reservation can expect from membership. Even on the Reservation, their share in the welfare program is more limited than that of those of higher degree of Indian blood.

He also reported:

There are 3,208 Indians on the census roll of this Reservation but they are hard to find now. In addition to the 600 permanently away from the Reservation, there are about 150 in the war, several hundred in outside Defense work, other hundreds away for higher wages and still others just away observing the outside world.

On October 7, 1942, your office wrote to Mr. Holst:

We have received and studied your copies of the two basic resolutions passed by the Flathead Council on September 25. We shall follow one of two courses of action:

(1) We shall recommend to the Secretary that he review the resolutions and approve of them.

(2) We shall allow the 90-day review period to pass without Secretarial review so that the resolutions would automatically become effective.

Either of these courses would lead to the approval of the resolutions. If case No. 2 is decided upon, we would then proceed to work out the legislation necessary to make certain parts of these two resolutions effective and submit the draft of this legislation to the Flathead Council.

While the approval would include approval of the use of the annuity roll of January 22, 1920, we would certainly later approach the Council with the suggestion that the constitutional roll be used rather than the annuity roll because the latter would necessitate a tremendous amount of bookkeeping to keep track of the inherited interests and would eventually result in the passage of headrights beyond the membership of the tribe. But we realize the potency of your arguments for the approval of the resolutions in toto at the present time.

The resolution was not submitted for Secretarial review.

On January 20, 1943, the Superintendent applied for an allotment of tribal funds in the amount of \$63,575 for the purpose of making "annual tribal annuity payments to 2,543 Flathead Indians." Mr. Woehlke by his memorandum of February 5, 1943, recommended that a \$25 payment be made and that the 1920 roll be used. Mr. Reeves expressed the opinion that it was entirely a question of policy whether the payment should be made on the 1920 roll, or "a new roll advocated, pursuant to which the dead enrollees would be stricken and the new-born children added, thus bringing the roll up to date annually before making payment." On February 12, 1943, Mr. Bruce of your office called attention to the fact that the use of the 1920 roll for this payment was in disregard of the provisions of the tribal constitution and the Solicitor's memorandum of May 17, 1941. He stated that the membership of the tribe as determined by the tribal constitution is entitled to the distribution of this money. On February 26 your office requested the Superintendent to inform you of the "number which represents present tribal membership determined pursuant to Article II of the Flathead constitution." On February 27 the Superintendent informed you that there was no constitutional roll. He reported further that while the council in December 1942 had appointed a committee to submit to the council a constitutional roll for approval, the council when requested to define the word "resident" appearing in paragraph b, section 1 of Article II of the tribal constitution, did not take action on this request

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and indicated that it did not want to take exception to the enrollment of any child born to any Flathead Indian anywhere. He stated further: "Our census roll shows approximately 3360 names." Thereafter the authorization of April 9, 1943, was approved.

The record before me discloses that the council has taken no action whatever on the per capita payment authorized by the Secretary. The matter has been before the council for many months. It has been discussed at various council meetings but all the council seems to have done was to authorize the preparation of a roll containing the names of all persons of Indian blood whose names appear on the official census roll of the tribe as of January 1, 1935, and whose names also appear on the Flathead annuity roll of January 22, 1920, who were living on April 9, 1943. The council agreed to approve such a roll as the roll upon which immediate payment of the per capita payment should be made. The record before me does not show that the council ever did actually approve such a roll.

The council has tabled numerous requests of the Superintendent and others that it take action on the matter particularly with respect to paying Indians born since January 22, 1920. Members of the council have expressed the opinion that they did not believe anyone had authority to eliminate the shares of the deceased Indians but nothing definite has been accomplished toward reaching a solution of the problem. In fact, the council has apparently taken no affirmative action in the matter since its resolution of September 25, 1942. The council is apparently about equally divided on the question of whether it should insist on distribution according to the 1920 roll or agree to distribution on the basis of the tribe's membership as determined by its constitution. On July 2, 1943, your office wrote to the Superintendent:

We understand that among the members of the council there is a difference of opinion as to which roll should govern. This has resulted in the delay in making the payment to many of the Indians. In view of the ruling of the Solicitor and the instructions of the Department, we feel that there is little excuse for failure to make the payment as directed * * * the tribe is without authority in this matter so far as this payment is concerned.

In view of the record I cannot agree with you that consent for the distribution authorized on April 9, 1943, is contained in Resolution No. 337.

No per capita payments can be made until the council acts. This is so because the council has the power, both by section 16 of the act of June 18, 1934 (48 Stat. 984, 25 U. S. C. A. sec. 476), and the tribe's constitution, adopted pursuant thereto, to approve or veto the disposition of tribal assets.

It is evident to me that the council's refusal to act has been motivated, in a large measure, by the fact that certain members of the council are laboring under a misconception of the council's right to insist upon distribution of the fund on the basis of the 1920 roll. If the legal effect of that roll be properly explained to the council, I believe that the impasse that has been reached would be broken.

The roll of 1920 was prepared pursuant to the provisions of section 28 of the act of May 25, 1918 (40 Stat. 591, 25 U. S. C. A. sec. 162), and the act of June 30, 1919 (41 Stat. 9, 25 U. S. C. A. sec. 163). Section 28 of the act of 1918 authorizes the Secretary of the Interior to withdraw from the United States Treasury and segregate the common or community funds of any Indian tribe that are susceptible of segregation so as to credit an equal share to each and every recognized member of the tribe and to deposit the funds so segregated in banks subject to withdrawals for payment to individual owners or expenditure for their benefit under regulations governing the use of other individual Indian moneys. Section 28 further provides that the funds of any tribe shall not be segregated until the final rolls of said tribe are complete. The act of 1919 authorizes the Secretary of the Interior in his discretion to cause a final roll to be made of the members of any Indian tribe, and declares that such roll, when approved by the Secretary, shall constitute the "legal membership of the respective tribes for the purpose of segregating the tribal funds as provided in section 28 of the * * * act approved May 25, 1918."

In a memorandum opinion by the Solicitor for this Department dated May 17, 1941, it was held that tribal rolls made and approved under the act of 1919 are required to be used only for the completion of the distribution of such funds as have been segregated under the act of 1918 and remain undistributed. As pointed out in that opinion neither act contains any provision requiring that the approved roll shall govern the tribal membership thereafter in such matters as voting in tribal affairs, organizing under a tribal constitution, sharing in the use of tribal land and credit funds, or for any other purpose, even the allotment of lands, save for the distribution of tribal funds susceptible of segregation. Even as to the distribution of tribal funds, however, it is important to notice that both statutes fall far short of creating any present vested interest in the individual members to unsegregated tribal funds. Under the rule of communal ownership, no individual member of the tribe has any vested, enforceable interest in tribal property whether land or funds. No such vested interest can be acquired by the individual member until the property has lost its tribal character and has become individualized.¹

¹ Cohen, *Handbook of Federal Indian Law*, pp. 183-4.

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Tested by this rule, it is clear that the acts of 1918 and 1919 grant no present interest to any individual Indian in the common or community funds of any tribe. The acts merely provide the means for the establishment of such an interest through individualization of the funds to be accomplished by segregating and crediting to each member an equal share in the funds so segregated. Under this view, which is in accord with that expressed in the opinion of May 17, 1941, the roll of 1920 must be regarded as controlling only for the purpose of making payment to enrollees whose names are shown on that roll, or to their heirs or legatees, of the shares of any tribal funds which have been segregated and individualized pursuant to the act of 1918.

You state that the funds proposed to be distributed by the tribal resolution of September 25, 1942, "are those received from the Montana Power Company under its contract with the tribe." The attached files reveal that the moneys proposed to be distributed are the result of a license issued on May 23, 1930, by the Federal Power Commission for the development of power on the Flathead Reservation under the provisions of the Federal Water Power Act of June 10, 1920 (41 Stat. 1063), and the act of March 7, 1928 (45 Stat. 200, 212). Under the provisions of the latter act "rentals from such licenses for use of Indian lands shall be paid the Indians of said reservation as a tribe, which money shall be deposited in the Treasury of the United States to the credit of said Indians, and shall draw interest at the rate of 4 per centum." The agreement entered into between the tribe and the licensee in 1936 at the time the Federal Power Commission amended the original license does not provide for the payment of any money directly to the tribe other than liquidated damages in the event the company failed to complete the first unit of the project within a specified time. The per capita payment in controversy was not, apparently, authorized to be made out of liquidated damages but out of annual payments made under the license.

Under the provisions of the license as amended, the licensee is required to pay annual charges into the Treasury of the United States as compensation for the use of the Flathead tribal lands. These charges, while nominal up to the year 1940, in that year and for the remaining years of the license became substantial. Some \$125,000 were due the tribe under the license in January 1941. It was with these funds that the council was dealing when it passed its resolution of September 25, 1942. No part of these moneys was segregated under section 28 of the act of 1918 and the utility of the roll of 1920 for the purpose of such a segregation was destroyed by the repeal

in 1938 of the authority for such a segregation.² Additional legislation effectively preventing the use of the 1920 roll had, moreover, intervened.³

By the act of June 18, 1934, *supra*, Congress affirmatively recognized the right of Indian tribes who accepted its provisions by tribal vote to determine their membership for all tribal activities. Section 16 of that act authorized such tribes to organize for their common welfare, to adopt appropriate constitutions, and to exercise all powers vested in them under existing law. One of these powers, inherent in every tribe, is the power of determining the membership of the tribe.⁴ The Flathead Tribe voted to accept the provisions of the act and has organized and adopted a constitution thereunder. The constitution prescribes definite rules of membership and is thus determinative of those who are entitled to share in the distribution of the tribal property. These rules, which are embodied in Article II of the constitution, read:

Section 1. The membership of the Confederated Tribes of the Flathead Reservation shall consist as follows:

(a) All persons of Indian blood whose names appear on the official census rolls of the Confederated Tribes as of January 1, 1935.

(b) All children born to any member of the Confederated Salish and Kootenai Tribes of the Flathead Reservation who is a resident of the reservation at the time of the birth of said children.

Section 2. The council shall have the power to propose ordinances, subject to review by the Secretary of the Interior, governing future membership and the adoption of members by the Confederated Tribes.

Section 3. No property rights shall be acquired or lost through membership in this organization, except as provided herein.

Under the provisions of the act of June 18, 1934, *supra*, and the provisions of the constitution adopted by the tribe thereunder, the tribal council has the privilege of approving or vetoing the per capita payment authorized by the Secretary on April 9, 1943. However, since the funds to be distributed have never been segregated under section 28 of the act of 1918, and since the roll of 1920 does not reflect the membership of the tribe as established by the constitution, and since section 8 of the corporate charter affirms the equal share of each recognized member of the tribe in the tribal assets, the council is without authority to require that the per capita distribution be made on the basis of the 1920 roll. In the absence of a constitutional amendment, the council must abide by the membership

² Section 2, act of June 24, 1938 (52 Stat. 1037).

³ See *Gritts v. Fisher*, 224 U. S. 640, and *Stemore v. Brady*, 235 U. S. 441, holding that until the creation of vested rights in individual members it is competent for the Congress to change the method of distribution of tribal property.

⁴ 55 I. D. 14.

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rules set forth in the constitution save where modified as to future membership in the exercise by the council of the power conferred on it by Article II, section 2. If the tribal council agrees that the per capita payment should be made, a constitutional roll for the distribution of the payment must be adopted. That roll may not include persons whose names appear on the 1920 roll and who died prior to April 9, 1943, nor may it include non-Indians or other persons not entitled to be recognized as members under the rules set forth in the constitution.

Your memorandum raises a further question: Does a per capita payment require approval of the tribe in a referendum? Article VI, section 1(h) of the tribe's constitution authorizes the council—

To appropriate for tribal use of the reservation any available applicable tribal funds, provided that any such appropriation may be subject to review by the Secretary of the Interior, and provided, further, that any appropriation in excess of \$5,000 in any one fiscal year shall be of no effect until approved in a popular referendum.

Since the funds in question are funds in the Treasury of the United States, they are not available for appropriation by the tribal council. Therefore, this section is without application to per capita payments authorized by the Secretary of the Interior, pursuant to statutory authority conferred by the acts of May 18, 1916 (39 Stat. 158, 25 U. S. C. A. 123), and May 17, 1926 (44 Stat. 560, 25 U. S. C. A. 155), to be made out of tribal funds in the Treasury of the United States.

PETITION OF COBB ET AL. IN RE BLACKFEET OIL DRILLING AGREEMENTS

Opinion, February 8, 1944

TRIBAL CONSTITUTIONS—INTERPRETATION—SUBSEQUENT LEGISLATION.

A tribal constitution does not freeze acts of Congress in existence at the time of its adoption, and powers constitutionally vested in a tribal council are not limited by any such act after it has been repealed or superseded.

POWERS OF TRIBAL COUNCIL—TRIBAL OIL LEASES—INDIAN PREFERENCE RIGHTS.

The Blackfeet Tribal Council is empowered, under the Blackfeet Constitution of December 13, 1935, and the act of May 11, 1938 (52 Stat. 347, 25 U. S. C. sec. 396a *et seq.*), to issue tribal oil leases, with or without competitive bidding, subject to departmental approval, and subject to the requirement that members of the tribe enjoy a preference right to obtain such leases before they are issued to nonmembers.

TRIBAL OIL LEASES—NECESSITY OF DEPARTMENTAL APPROVAL.

Such a lease is ineffective prior to departmental approval and the holder of such an unapproved lease has no rights against the holder of an approved

lease to the same land even though the approved lease bears a later date of execution than the unapproved lease. *Anicker v. Gunsburg*, 246 U. S. 110.

DEPARTMENTAL APPROVAL OF LEASES—EFFECT OF APPROVAL AS TO FORM.

Departmental approval of a form of contract is not approval of a contract subsequently executed under such form.

BLACKFEET OIL DRILLING AGREEMENTS—EFFECT OF RELIANCE ON UNAPPROVED LEASE.

Equitable circumstances may create a moral duty on the part of the Blackfeet Tribal Council and the Interior Department to offer a second lease as nearly equivalent as possible to one that was offered and accepted in good faith but never received final departmental approval.

Where a lease was offered by the Blackfeet Tribal Council in good faith on a form approved by the Department and the presumptive lessee accepted the lease and expended considerable sums in preparation for drilling thereunder, and such lease was not approved but the land covered by it was subsequently leased to another party, an equitable or moral obligation rests with the Tribal Council and the Department to offer another lease, as nearly equivalent as possible to the first, to one who has suffered by bona fide reliance on the validity of the unapproved lease.

BOARD OF APPEALS (FELIX S. COHEN, CHAIRMAN, WILLIAM H. FLANERY, LELAND O. GRAHAM).

Messrs. Charles F. Consaul (Washington, D. C.); and E. J. McCabe (Great Falls, Montana), for petitioners.

Mr. H. C. Hall (Great Falls, Montana), for respondents, Wright Hagerty, Grace Hagerty, and Levi J. Burd.

This case having been heard before the Board of Appeals, Felix S. Cohen, Chairman, William H. Flanery, and Leland O. Graham, the Board, upon the evidence adduced, makes the following

FINDINGS OF FACT

1. The mineral rights in the lands upon which petitioners and respondents claim oil drilling agreements (SW $\frac{1}{4}$ Sec. 24, T. 32 N., R. 6 W., Mont.; NW $\frac{1}{4}$ Sec. 32, T. 32 N., R. 5 W., Mont.; NE $\frac{1}{4}$ Sec. 32, T. 32 N., R. 5 W., Mont.) have belonged to the Blackfeet Tribe from time immemorial, are within the Blackfeet Indian Reservation, and are subject to leasing by the Blackfeet Tribal Business Council with the approval of the Department of the Interior.

2. On December 13, 1935, the Constitution of the Blackfeet Tribe, adopted by vote of the tribe, was approved by the Secretary of the Interior, under authority granted by the act of June 18, 1934 (48 Stat. 984), as amended.

3. On August 15, 1936, the Blackfeet Tribe, by a vote of 737 for and 301 against, ratified a corporate charter issued to the tribe by

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the Secretary of the Interior pursuant to the aforesaid act of June 18, 1934, as amended.

4. Respondents are members of the Blackfeet Tribe. Petitioners are not. Petitioner Sederholm was, at the time of executing the agreement hereinafter referred to, employed by Petitioner Cobb as bookkeeper (R. 32).

5. On February 5, 1943, the Blackfeet Tribal Business Council entered into a contract with C. R. Teter of Cut Bank, Montana, under which Mr. Teter was authorized to act as agent for the Blackfeet Tribe in negotiating oil drilling agreements under agreed terms for tracts of land not to exceed 160 acres each, within an area not exceeding 6,400 acres. Under this agreement the tribe was to secure a royalty of 17½ percent under each oil drilling agreement, plus a share of not less than 35 percent in any net profits secured thereunder, out of which a 2 percent net participating royalty was to be paid to Mr. Teter as compensation for services rendered. The agreement between Mr. Teter and the Blackfeet Tribe further provided: "This contract shall be void if there is no performance within six months from the date hereof."

6. On March 4, at a meeting of the Blackfeet Tribal Business Council, Mr. Teter presented 13 drilling agreements for approval. The Council voted to approve these agreements "subject to approval of the Secretary of the Interior of the Drilling contracts."

7. During the week of April 17, 1943, a well was completed on the Blackfeet Reservation in Sec. 31, T. 32 N., R. 5 W., M. M. This well is reported in the Montana Oil Journal of April 17 as the season's largest oil well in Montana. It is located on a section adjacent to a section (Sec. 32, T. 32 N., R. 5 W.) in which Mr. Teter had already negotiated four agreements.

8. On May 12, Assistant Secretary Chapman approved a memorandum, submitted by Solicitor Gardner on May 11, which gave departmental approval to a new form of oil drilling agreement, incorporating several variations from the form originally agreed upon by Mr. Teter and the Blackfeet Tribal Council. The memorandum of May 12 purports to evidence "approval of the revised contract." It relates entirely to the terms of the proposed drilling agreement, rather than to any particular agreements. The modifications suggested in the terms of the agreement are, on the whole, technical modifications based upon advice from the Geological Survey. The revised form of agreement bears the notation:

"Approved as to form: May 12, 1943.

Oscar L. Chapman,

Assistant Secretary."

9. On the same day the Secretary of the Blackfeet Tribal Business Council was advised, by telegram signed by Assistant Secretary Chapman :

Retel 11 Revised form drilling contract approved and returned to Indian Office today. 20 contracts heretofore negotiated by Teter may be reexecuted on revised form subject to approval of Superintendent and furnishing required bonds. No further contracts to be made pending fair trial drilling contract plan.

10. On May 12 notices were sent by the Secretary of the Blackfeet Tribal Business Council to the holders of agreements on the disapproved form advising that oil drilling agreements theretofore executed had been disapproved by the Department and inviting renegotiation on the basis of revised forms.

11. Between May 12 and June 23 Mr. Teter negotiated some 18 new oil drilling agreements, of which 10, including one made with Petitioner A. B. Cobb, corresponded in acreage and parties to original agreements and 8 involved variations. The acreage originally allocated to J. A. Cronin was renegotiated to Petitioner Wm. A. Hanlon, with the consent of Mr. Cronin. The acreage originally allocated to Everett Crumley was renegotiated to Petitioner Sederholm without the consent and over the protest of Mr. Crumley.

12. On June 4 Mr. Teter reported that 18 contracts had been negotiated. The Blackfeet Tribal Business Council voted to authorize the Executive Committee with the approval of the Oil Committee to approve these 18 contracts, on the understanding that they were with "some of the original twenty oil operators allowed by the Indian Office to sign the oil drilling agreements." (Minutes of June 4, par. 1.)

13. On June 10 Mr. Teter, upon inquiring of Superintendent McBride concerning approval of new agreements, was advised that Superintendent McBride would not approve new agreements if there was any "reshuffling" of acreages.

14. On or about June 12 Mr. Teter advised Petitioner Cobb of Superintendent McBride's attitude.

15. On June 18 Petitioners Cobb, Sederholm, and Hanlon signed drilling agreements on the new form, delivering the same on the following day to the Blackfeet Tribal Business Council.

16. On June 19 a member of the Blackfeet Tribe, Frank W. Norman, filed claim to a preference right agreement on land allocated by Mr. Teter to a non-Indian. On the same day the Vice Chairman of the Blackfeet Tribal Business Council, Mr. George Pambrun, submitted a telegraphic inquiry to the Assistant Commissioner of Indian Affairs as to whether Indian preference rights applied to oil drilling agreements.

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17. On June 21 a similar inquiry was submitted to the Assistant Commissioner by Superintendent McBride.

18. On June 22 Everett Crumley of Cut Bank, Montana, wrote to the Blackfeet Tribal Business Council to complain that Mr. Teter had refused to permit him to reexecute his oil drilling agreement on the new form. A copy of this letter was forwarded to Assistant Commissioner Zimmerman on the following day.

19. On June 22 Vice Chairman George Pambrun submitted telegraphic inquiry to Associate Solicitor Cohen as to application of constitutional preference rights to oil drilling agreements.

20. On June 23 Associate Solicitor Cohen wired Mr. Pambrun that the Solicitor's Office viewed the membership preference right as applicable to oil drilling agreements.

21. On June 23 the Secretary of the Blackfeet Tribal Business Council advised Superintendent McBride that 10 contracts had been completed on the new form with parties holding old-form agreements and that 8 contracts had been executed involving exchanges or new locations.

22. Among the substitutions so listed on June 23 were those of Petitioner Hanlon for J. A. Cronin's original acreage and Petitioner Sederholm for Everett Crumley's original acreage. The memorandum of the Secretary of the Council, dated June 23, contains these comments:

Wm. Hanlon * * * (new location) previous location of J. A. Cronin. *Cecil Sederholm* (previous location) none. (Present location) was the previous location of Everette F. Crumley, who has been denied his previous location.

23. On June 25 Assistant Commissioner Zimmerman wired Superintendent McBride as follows:

Withhold approval drilling contract under authority office letter May 21 until receipt further instructions regarding preference right of tribal members. Advise George Panbrun [sic] that we are asking Department for decision on this question.

24. On June 28 a meeting of the Blackfeet Tribal Business Council was held for the purpose of discussing Indian preference rights to oil drilling agreements; applications for preference right agreements having been received from Frank W. Norman, George Pambrun, William Billedeaux, Mrs. J. W. Show, and Wright Hagerty (Minutes of June 28, par. 1). Action on preference claims was deferred until July 1.

25. On July 1 the Blackfeet Tribal Business Council, after a discussion of preference rights, voted 7 to 4 "reaffirming the 20 drilling contracts as approved previously by the Council in their meeting held March 22, 1943." (Minutes of July 1, par. 10.)

26. On July 3 Assistant Secretary Chapman approved a memorandum signed by Assistant Commissioner Zimmerman on June 25, advising that the Department considers membership preference rights applicable to oil drilling agreements.

27. On July 14 petitioners and other holders of revised drilling agreements received notices in the following form:

At a regular meeting of the Blackfeet Tribal Business Council held July 1st, 1943, your drilling contract as approved at a previous meeting was reaffirmed, thereby definitely approving of your contract as presented by Mr. C. R. Teter in accordance with memorandum from the Department of the Interior.

If you have returned your contract properly signed by you and you have secured a proper bond from the reliable bonding company we consider this sufficient evidence for you to proceed and make necessary arrangements to begin operations, in accordance with executed contract, with the provision that we will notify you that the bonds are acceptable by the Tribe. This will be our authority for you to commence operations in accordance with executed drilling contract.

We wish to inform you, however, that owing to extenuating circumstances that have arisen that to date the local approving signature has not been obtained, but regardless of this fact we feel that all parties concerned have acted in good faith and intend keeping our part in this contract.

Very truly yours,

Executive Committee:

Richard Grant Sr.

Leo M. Kennerly

Oil Committee:

Signed: Brian Connelly

Leo M. Kennerly

Joseph W. Brown

After receipt of such notices petitioners expended considerable sums of money in acquiring equipment for performance of oil drilling agreements they had executed.

28. On July 15 the Assistant Commissioner, by letter to the Chairman of the Council, advised that the approval of executed oil drilling agreements was being held up pending the offering of such agreements to tribal members claiming preference rights, and suggested that five days' notice be given of proposed agreements, with opportunity to tribal members (excluding, however, members of the Council) to file for same during that period.

29. On July 21 the Council voted to allow preference rights to members on the tracts in question by posting notices of drilling agreements for five days as recommended by Indian Office.

30. On July 26 a Council meeting was held at which preference-right applications were considered. Preference-right applications were received from William Norman, Wright Hagerty, Grace Hagerty, Mrs. J. W. Show, and L. J. Burd. An application formerly

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filed by George Pambrun, Vice Chairman of the Council, was withdrawn. A motion by Council Secretary Kennerly to reject all preference applications was defeated. Financial statements were then submitted by the various Indian applicants for preference rights. Upon consideration of these statements the Council voted to approve the issuance of five agreements to L. J. Burd, Wright Hagerty, Grace Hagerty, J. W. Show, and William Norman. The Council voted to hold a further meeting on oil drilling agreements on July 28.

31. On July 28 preference-right applications of Wright Hagerty, Grace Hagerty, L. J. Burd, Mrs. J. W. Show, and William Norman were again approved by the Council. At this same meeting a motion was made by Secretary Kennerly which is reported in the Council minutes in the following terms:

* * * that any member of this present Council who shall during the life of this contract, acquire any interest whatsoever in such contract, or who has received any other compensation for the awarding of this drilling contract shall be sufficient cause for the cancellation of this drilling agreement.

This motion was carried.

32. At the same meeting of July 28, the Council voted—

to grant William Hanlon forty acres tribal land as follows:

NW $\frac{1}{4}$ NW $\frac{1}{4}$ of section 32, township 32, range 5,

to be taken from the Wright Hagerty application leaving Wright Hagerty 120 acres described as follows:

NE $\frac{1}{4}$ NW $\frac{1}{4}$ and N $\frac{1}{2}$ N $\frac{1}{2}$ NE $\frac{1}{4}$ of section 32, twp. 32, range 5.

33. On August 5 Assistant Secretary Chapman transmitted the following telegram to Superintendent McBride:

Contracts executed under Teter contract plan approved May 11 should be promptly approved by you except for Crumley contract on which further investigation is necessary, unless Council wishes to substitute Indian contracts for original contracts, in which case you are authorized to approve substituted contracts. Advise Council promptly of contents this telegram.

34. On August 6 the Council voted to authorize the Chairman and temporary secretary to sign oil drilling agreements with five Indians asserting preference rights. (Minutes of August 6 Meeting, par. 8.) This was done.

35. On August 9 various agreements executed as aforesaid, including those with Respondents Grace Hagerty, Wright Hagerty, and Levi J. Burd (with Daisy W. Burd), were approved by Superintendent McBride.

36. On September 2 the Council voted to rescind the motion proposed by Secretary Kennerly and approved on July 28 concerning participation of Council members in oil drilling contracts.

37. Subsequent to August 9, and prior to October 18, drilling was undertaken by the three Indian respondents on the tracts awarded to them, and two producing wells were completed on the tracts awarded to Wright Hagerty and Levi Burd.

CONCLUSIONS OF LAW

1. The petitioners' oil drilling agreements with the Blackfeet Tribal Business Council were never approved by or on behalf of the Department of the Interior.

2. The refusal of the Superintendent to approve the same was lawful and within the scope of his authority.

3. The said agreements of petitioners are incomplete and invalid.

4. Since petitioners did not on August 9 have outstanding valid agreements, and since this was not the result of any wrongful act on the part of the Department, the Superintendent of the Reservation acted lawfully and within the scope of his authority on that date in approving agreements, covering the same tracts, made between the Blackfeet Tribal Business Council and the respondents.

5. Agreements so made with respondents are valid contracts which may not now be disturbed.

6. Petitioner Cobb has suffered a loss as a result of the lawful action of the Council and the Department, and although he is not legally entitled to redress therefor, it would be within the discretionary power of the Council and the Department to allow such redress as would not infringe upon the rights of respondents.

7. Petitioners Sederholm and Hanlon have established no equities entitled to recognition as against the Blackfeet Tribal Business Council, the Department of the Interior, or the respondents.

OPINION

Petitioners in this proceeding seek to establish a right to have the Department approve three oil drilling agreements executed by them and by the Blackfeet Tribal Business Council, on lands within the Blackfeet Indian Reservation, and, concurrently, to have the Department disapprove three similar agreements, covering the same land, subsequently executed by the Blackfeet Tribal Business Council and by the respondents and approved by the Superintendent of the Blackfeet Indian Reservation.

Such relief is sought as an exercise of the Secretary's general supervisory authority over the business of the Department and specifically over the action of the Superintendent of the Blackfeet Indian Reservation in refusing to approve the petitioners' agreements and in approving those of the respondents.

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In support of such relief petitioners urge: (1) that their agreements with the Tribal Council are in all respects valid, and (2) that the agreements held by respondents are invalid. Under the latter contention, two grounds of invalidity are advanced: (a) that agreements with petitioners antedate those with respondents and were valid and outstanding when agreements with respondents were executed and approved covering the same lands, and (b) that agreements with respondents are vitiated by fraud.

At the outset the issues in this proceeding may be simplified by eliminating from the ambit of consideration the petitioners' charge of fraud. This charge is unsupported by any evidence adduced by petitioners. A careful scrutiny of the departmental records fails to reveal any other evidence that would support petitioners' charge. In fact, the person upon whose testimony petitioners place particular reliance, Mr. C. R. Teter, referred to the Tribal Council in the following terms in a letter to Assistant Commissioner Zimmerman, dated July 17: "* * * to this date I have not had one person in the Tribal Council offer me one cent nor has any one of them ever intimated that they wanted one cent. So this above all is to my notion the finest part of the whole deal." Apparently petitioners have misconstrued a series of Tribal Council discussions on the question whether a Council member may enter into an oil drilling agreement covering tribal land on the same basis as any other member of the tribe (Findings of Fact, pars. 31, 36),—an issue which is not involved in this proceeding,—and have erroneously inferred that this discussion was directed to the propriety of Council members accepting compensation for voting on such agreements. Any such inference is an unwarranted reflection upon the integrity of the body from whom petitioners claim to have received whatever rights they have.

Stripped of any question of fraud, the question at issue comes down to a question whether the petitioners or the respondents were the first to acquire valid contracts within the disputed area. *Jones v. Meehan*, 175 U. S. 1. On this issue the Board is of the opinion that the agreements of respondents were completed and approved on August 9, 1943 (Findings of Fact, par. 35), that at that time the conflicting agreements of petitioners were unapproved and therefore incomplete, and that, accordingly, the petitioners have no rights sufficient to support the relief requested in this proceeding. See *Grisso v. United States* (C. C. A. 10), decided November 10, 1943. On the other hand, facts alleged by the petitioners and developed in this proceeding do raise a serious question as to whether other forms of relief are not equitably due to remedy an injustice to at least one of the petitioners which was not committed by the respond-

ents, and for which the respondents cannot properly be asked to make any restitution, but which arose as an unforeseen consequence of an experimental procedure in the disposition of tribal oil.

The facts of this case are separately set forth in the Findings of Fact and need not here be restated.

The governing statute under which the validity of the agreements here in question must be tested is the act of May 11, 1938 (52 Stat. 347, 25 U. S. C. sec. 396a, *et seq.*). This statute, enacted prior to any of the transactions in controversy, authorizes the leasing of Indian tribal lands for mining purposes by the tribal council, or other representative body, of the tribe which owns the minerals. This act specifies a procedure to be followed in the case of oil and gas leases, but expressly declares that these procedural provisions shall not restrict the right of tribes (such as the Blackfeet) that are organized and incorporated under sections 16 and 17 of the act of June 18, 1934 (48 Stat. 984, 986, 25 U. S. C. secs. 476-477), to execute leases in accordance with the provisions of any tribal constitution and charter.

Under the governing statute, recourse must be had to the Constitution and Charter of the Blackfeet Tribe to determine the precise conditions under which the Blackfeet Tribal Business Council may legally dispose of tribal property.

Article VI, section 1, subsections (a) to (r) inclusive, of the Blackfeet Constitution enumerate the powers to be exercised by the Tribal Business Council. These provisions so far as material read:

SECTION 1. *Enumerated powers.*—The council of the Blackfeet Reservation shall exercise the following powers, subject to any limitations embodied in the statutes or the Constitution of the United States, and subject further to all express restrictions upon such powers contained in this constitution and the attached by-laws.

* * * * *

(e) To manage all economic affairs and enterprises of the Blackfeet Reservation, including all oil leases on tribal lands and the disposition of all oil royalties from tribal lands, in accordance with the terms of a charter to be issued to the Blackfeet Tribe by the Secretary of the Interior.

Provision for the exercise by the Council of additional powers to be conferred in the future is made by section 3 of Article VI, which reads:

SECTION 3. *Future powers.*—The council of the Blackfeet Reservation may exercise such further powers as may in the future be delegated to the Council by the members of the tribe or the Secretary of the Interior or by any other duly authorized official or agency of the State or Federal Governments.

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Article VII, section 3 of the Blackfeet Constitution provides:

Leasing of Tribal Lands.—Tribal lands may be leased by the tribal council, with the approval of the Secretary of the Interior, for such periods of time as are permitted by law.

No lease of tribal land to a nonmember shall be made by the tribal council unless it shall appear that no Indian cooperative association or individual member of the tribe is able and willing to use the land and to pay a reasonable fee for such use.

Grazing permits covering tribal land may be issued by the tribal council, with the approval of the Secretary of the Interior, in the same manner and upon the same terms as leases.

The corporate charter of the Blackfeet Tribe further provides:

5. The Tribe, subject to any restrictions contained in the Constitution and laws of the United States, or in the Constitution and By-laws of the said Tribe, shall have the following corporate powers, in addition to all powers already conferred or guaranteed by the Tribal Constitution and By-laws.

* * * * *

(b) To purchase, take by gift, bequest, or otherwise, own, hold, manage, operate, and dispose of property of every description, real and personal, subject to the following limitations:

* * * * *

(2) No leases or permits (which terms shall not include land assignments to members of the Tribe) or timber sale contracts covering any land or interests in land now or hereafter held by the Tribe within the boundaries of the Blackfeet Indian Reservation shall be made by the Tribe for a longer term than ten years, and all such leases, permits, or contracts must be approved by the Secretary of the Interior or by his duly authorized representative; but oil and gas leases, or any leases requiring substantial improvements of the land may be made for longer periods when authorized by law.

The foregoing provisions, defining and limiting the powers of the Blackfeet Tribal Business Council, must be read in the context of the act of May 11, 1938. So read, they authorize the Council to issue oil leases with departmental approval, subject to prescribed terms and conditions.

Petitioners would have us read these provisions as monuments of legal history, and insist that they cannot apply to oil leases unless the Tribal Council had power in 1935, when the Constitution was adopted, to make oil leases. We think the early statutes, and particularly the act of February 28, 1891 (26 Stat. 794, 795, 25 U. S. C. sec. 397), did in fact grant to the Tribal Council power to make oil leases (subject to departmental approval), but we consider that irrelevant to the purposes of this case. These provisions of tribal constitution and charter were not adopted by or for legal historians with faces turned to the past. They were adopted to cover the future of a group which was embarking upon an experiment in self-govern-

ment. They contemplated that the future would bring further grants of power from Congress or from administrative agencies of the Federal Government. They provided that the exercise of all such powers should be bound by certain rules intended to safeguard the interests of the tribe and its members. Viewed in this light, it is clear that the Tribal Business Council, in 1943, has the right to lease tribal oil, with or without competitive bidding, subject to the approval of the Secretary of the Interior or his authorized representative, but that it may not lease such property to a person who is not a member of the Blackfeet Tribe "unless it shall appear that no Indian cooperative association or individual member of the tribe is able and willing to use the land and to pay a reasonable fee for such use." The Department and the Office of the Solicitor have repeatedly ruled that the quoted provision is applicable to oil and gas leases of tribal lands and that it has the effect of according to members of the tribe a preference right to obtain such leases before they are issued to non-members.*

Under the act of 1938 and the pertinent provisions of the Constitution and Charter of the Blackfeet Tribe we must hold that the agreements entered into between the Council and the petitioners were invalid because they were never approved by the Secretary of the Interior but were on the contrary disapproved by a representative of the Secretary acting in a lawful and authorized manner, and further because they were entered into without taking into account the preference right of tribal members under Article VII, section 3, of the Constitution.

On the question of departmental approval, petitioners argue that their agreements were approved, in effect, by the Assistant Secretary of the Interior on May 12 when he endorsed the memorandum of the Solicitor which is attached to the petition. But a careful reading of the memorandum in question makes clear what would in any event be clear from the circumstances surrounding its execution, namely, that what was approved in this memorandum was a *form of contract*, and not 20 actual contracts. As if to eliminate any doubt on the score, the Assistant Secretary, at the same time that he approved the memo-

* Memorandum of Acting Solicitor Kirgis, March 16, 1939; letter of May 1, 1939, to Superintendent from Assistant Commissioner, approved by Assistant Secretary on May 9, 1939; letter of August 26, 1939, to Council Chairman from Assistant Secretary; memorandum of February 12, 1940, to Commissioner from Assistant Secretary; letter of February 26, 1940, from Superintendent to Commissioner, approved by Acting Assistant Secretary; preferential lease to Wright Hagerty, approved June 9, 1941; preferential lease to Levi J. Burd, approved January 28, 1942; letter of October 19, 1942, to Secretary of the Interior from Assistant Commissioner, approved by Assistant Secretary; letter of May 26, 1942, to Superintendent from Assistant Commissioner, approved by Assistant Secretary.

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random in question, placed his signature upon the revised contract form with the notation, "Approved as to form: May 12, 1943." (Findings of Fact, par. 8.) A letter from Assistant Commissioner Zimmerman to Superintendent McBride, dated May 21, refers to the Assistant Secretary's action in these terms: "On May 12, 1943, the Assistant Secretary approved a plan of the Blackfeet Tribal Council, etc."

The memorandum recites in express terms: "The contract designates the Superintendent of the Blackfeet Reservation as the approving official." This delegation of power to the Superintendent is a real delegation of power, a delegation of the power which the Secretary or Assistant Secretary, under the governing statutes and the tribal constitution and charter, would otherwise have to exercise personally. This power of approval involves discretion and judgment. In approving an oil lease, the Assistant Secretary is charged with a high fiduciary duty. He may reject a lease that is legally perfect if he finds reason to doubt the reliability of the lessee, or reason to question the circumstances under which the lease was executed. He may reject a lease for no other reason than that the value of the property has appreciably increased since the date when the lease was first agreed upon. He may reject a lease to non-Indians if he determines that a lease to Indians would be more in accord with tribal or Federal policy. He may refuse approval of a lease because of minor irregularities as to signature, date, or acknowledgment, even though these irregularities would not preclude legal enforcement of its terms if it were approved. In other words, he has the right to insist upon a document that is not only legally enforceable but legally perfect beyond doubt or cavil. And he is not under a duty to set forth the reasons for his disapproval exhaustively in such a fashion as to waive the right to disapprove on other grounds if those reasons should turn out to be defective.

This power,—the broadness of which petitioners recognize (see Petitioners' Reply Brief at p. 12, citing *United States v. Barnsdall Oil Co.*, 127 F. (2d) 1019 (C. C. A. 10),—was not exercised and exhausted on May 12 when the Assistant Secretary approved a *form of contract* without even attempting to examine or consider any of the 20 agreements which had been actually executed on a different and unacceptable form. Far from being exercised or exhausted, this power was expressly delegated to the Superintendent of the Blackfeet Reservation. That official was then in a position, in passing upon contracts made on this form, to do whatever the Assistant Secretary might do, and to leave undone what the Assistant Secretary might leave undone. He could not, of course, object to the form, which had

been approved. But in all other respects his discretion was as broad as that of the Assistant Secretary in passing upon any contract made in accordance with a prescribed form.

The record shows that in the exercise of this discretion the Superintendent of the Blackfeet Reservation declined to approve three agreements executed by the petitioners. On its face this action left the way clear to the Blackfeet Tribal Council to execute, and to the Superintendent to approve, oil drilling agreements on these lands to other parties. Petitioners contend, however, that this action of the Superintendent was wrongful and should therefore be considered a nullity or be set aside. It is, therefore, necessary, in order to do justice to the petitioners' argument, to consider the basis of the Superintendent's action in refusing approval to these agreements. Three grounds were advanced in explanation of this refusal: (1) that the allocations of the twenty areas had been "reshuffled" after the completion of an important producing well in the neighborhood, and that this reshuffling was not to the advantage of the tribe; (2) that the preference provisions of the tribal constitution had been ignored; and (3) that the agreements as presented, and the accompanying bonds, showed some minor irregularities as to date and acknowledgment.

These grounds were not advanced simultaneously to the petitioners: the first was communicated on or about June 10 to Mr. Teter, who promptly passed the information on to the petitioners (R. 34-35; Findings of Fact, pars. 13-14); the second was communicated to Petitioner Cobb, in response to an inquiry, on September 6 (Affidavit of A. B. Cobb, p. 4), but the matter had been discussed on the reservation at least since May 4, when Council Vice President Pambrun, who had represented the Council in Chicago and Washington conferences on the oil drilling agreements, reported to the Council an Indian Office recommendation that the Council "advertise the contracts to the Indians before advertising to the public." (See, also, Findings of Fact, par. 16 *et seq.*); the third objection was apparently not communicated to the petitioners until after the hearing in this case. To have set forth all these objections simultaneously and completely might have prevented confusion; but not to do so was not a breach of any duty owed to the petitioners. The omission did not invalidate the Superintendent's refusal to approve the contracts, nor did it transform his disapproval into an approval.

Petitioners argue that all the reasons advanced by the Superintendent for not approving these agreements are invalid. If this were the case it would still not necessarily follow that he approved the agreements, or that the agreements might now be approved by the Depart-

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ment *nunc pro tunc* so as to divest the rights of third parties who have since been granted leases on these lands. But it is unnecessary to decide whether the power of the Superintendent or the Secretary extends so far as to allow such action, for, assuming that the authorities cited by petitioners (*Anchor Oil Co. v. Gray*, 257 Fed. 277 (C. C. A. 8, 1919), *aff'd* 256 U. S. 519; *Pickering v. Lomax*, 145 U. S. 310; *United States v. Getzelman*, 89 F. (2d) 531 (C. C. A. 10, 1937); *Hallam v. Commerce Min. Co.*, 49 F. (2d) 103 (C. C. A. 10, 1931); *Almeda Oil Co. v. Kelley*, 35 Okla. 525, 130 Pac. 931) substantiated the power of the Department in an appropriate case to approve the contracts first executed, notwithstanding an outstanding approval given to other contracts, the fact remains that no such action has been taken and no legal right to such action has been established. A right to demand such action could be established only by demonstrating first, that the securing of leases on Blackfeet oil is, like the securing of certain leases on the public domain (*Hoyt v. Weyerhaeuser*, 161 Fed. 324 (C. C. A. 8, 1908), a matter of statutory right, and, second, that all of the grounds advanced by the Superintendent for rejecting the petitioners' agreements are invalid. We are of the opinion that no person has any statutory right to demand a lease of Blackfeet oil, and, in any event, that at least two of the grounds advanced by the Superintendent afford lawful reasons for supporting the administrative decision to reject petitioners' agreements and to approve instead the agreements executed with respondents.

(1) The "reshuffling" of agreements of which the Superintendent complained has a particular bearing upon the claims of Petitioners Sederholm and Hanlon. Sederholm was not among the original 20 who executed agreements in February and March on the form that was later rejected. He came into the picture in June, only after a large oil well, reputed to be the season's largest in Montana, had been completed in the section of land adjoining the section in which he now makes claim. (Findings of Fact, par. 7.) The quarter section which he claims had originally been allocated to one Everett Crumley. It is alleged that Mr. Crumley offered to pay the agent of the Tribal Council a sum of money if his contract should be reinstated on the new form. (R. 2.) This was regarded as an attempt at bribery and was advanced as the sole reason for refusing to renegotiate a contract as proposed. It is difficult to believe that anybody would have offered to pay the agent of the Tribal Council a bribe or bonus for doing what he planned to do anyway, namely, to renegotiate agreements on the new form with those who already held agreements on the old form. If any offer of payment was made, it would be easier to understand the offer as based upon a belief that the agent of the Tribal

Council, Mr. Teter, planned to take away a very promising tract and to award the tract to one of Mr. Teter's own business associates. The records of the Department contain a good deal of evidence as to financial relationships connecting Mr. Teter, Mr. Hanlon, Mr. Sederholm and Mr. Cobb. Mr. Teter testified to his business associations with Mr. Hanlon (R. 4), and the records of the Department show that Mr. Teter purported to act as agent for Mr. Hanlon in securing a tribal oil lease in 1942. (See letter of Assistant Secretary Chapman to Chairman of Blackfeet Tribal Business Council, dated May 21, 1942.) Mr. Sederholm is acknowledged to be a bookkeeper employed by Mr. Cobb (Findings of Fact, par. 5). Mr. Cobb is referred to by Mr. Teter in a letter to the Tribal Council, dated June 10, in the following fashion: "Now the reason why I gave Mr. Cobb through a man by the Name of Sederholm who is his head office man is because Mr. Cobb while in Washington City actually assisted and helped us all that was possible * * *."

In the proceedings before this Board, neither the integrity of Mr. Teter nor the integrity of Mr. Crumley is in issue. No charges against either of these gentlemen have been presented to the Board, and naturally no answers have been made by either individual to any such charges. Nothing in the foregoing discussion, therefore, is to be taken as reflecting in any way upon the integrity of either individual. The foregoing discussion is directed merely to the question of whether the Superintendent of the Blackfeet Reservation could reasonably conclude, from all the facts available to him at the time, that there had been a "reshuffling" of contracts which involved new economic factors and which was not required in the interests of the Blackfeet Tribe. We hold that in the circumstances revealed this conclusion was justified.

Somewhat similar considerations apply to the reshuffling involved in the claim of William M. Hanlon. The tract involved in that claim was one that had previously been awarded to one J. A. Cronin. The terms and circumstances under which the tract in question was transferred from Cronin to Hanlon were not revealed, although Mr. Teter testified that there was a "deal" between the two involving the use of equipment (R. 31) and Mr. Cronin advised the Council (by letter of June 23) that he was ceding his claim to Mr. Hanlon because "Mr. Bill Hanlon and I made an operating contract between ourselves." This tract, like the Crumley-Sederholm tract, was located close to the large well which had been completed during the week of April 17. In view of these facts we hold that the Superintendent of the Blackfeet Reservation was amply justified in concluding that the economic advantages incident to the increased value of this tract were being reaped by parties other than the Blackfeet Tribe and that

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any contract submitted in such circumstances ought not to be approved.

In these respects, Petitioner A. B. Cobb is in a better position than either of his co-petitioners. He was one of the original contractors under the original disapproved form of agreement. The agreement which he presented to the Superintendent on or about June 19 covered precisely the same area as that covered by his original agreement, applied for on February 24. Nevertheless, the Superintendent of the Blackfeet Reservation felt that if there were any "reshuffling" at all, he would prefer not to sign any agreements until the whole matter had been presented to the Department. While we think this was perhaps an overstrict reading of his instructions, we cannot say that this view was wholly unreasonable, particularly in its application to Petitioner Cobb who himself expected to profit (through the allocation to his employee, Sederholm) from the reshuffle. We hold, therefore, that the Superintendent of the Blackfeet Reservation acted within the scope of his authority in refusing to approve the agreements presented on or about June 19 by all three petitioners.

(2) The fact that all the agreements with petitioners had apparently been issued in violation of the preference right accorded by the Blackfeet Constitution to members of the Blackfeet Tribe provided a second justification for the refusal of the Superintendent to approve petitioners' agreements. The Superintendent clearly had a right to rely upon decisions already rendered by the Department holding such preference provisions to be applicable to oil leases. He was not bound at his peril to substitute his own legal judgment for that of the Solicitor and Assistant Secretary of the Department, even if he thought their judgment on this question unsound. In refusing to approve petitioners' agreements he was clearly acting within the scope of his duty. Petitioners place considerable stress on the fact that a memorandum from Acting Solicitor Cohen to the Assistant Secretary dated June 6, 1941, and approved by the Assistant Secretary on June 9, 1941, contains the statement:

* * * I find it unnecessary to consider at this time the further question whether the Tribal Council was in fact under a duty, by reason of the provisions of the tribal constitution and charter, to grant a preference to members of the tribe before making any lease to a non-member.

But it is difficult to see how this expression can help the petitioners' argument that the Superintendent's refusal to approve their agreements was a wrongful act. If the question whether the Blackfeet Tribal Business Council might ignore membership preferences in issuing an oil lease was so abstruse that the Acting Solicitor of the Department preferred not to answer it, in a case where the question

was not squarely raised, then certainly the Superintendent of the Blackfeet Reservation was under no legal duty to answer that question himself. Indeed, the mere existence of doubts on this question justified the Superintendent in refusing to approve the agreements presented and in seeking advice, which in fact he promptly sought and quickly obtained, as to whether a prior opportunity to accept or reject the contracts in question should be offered to members of the Blackfeet Tribe. The Superintendent and the Council were advised (tentatively by telegrams of June 23 and June 25 and definitively by letter of July 15) that the preference provisions of the tribal constitution should be followed. (Findings of Fact, pars. 16-26.) Although it is not necessary to pass upon the legal correctness of this decision, beyond the point that it was within the jurisdiction of the Department to make the decision it made, we think the advice rendered was sound. The property in question is tribal property. *British-American Oil Co. v. Board of Equalization of Montana*, 299 U. S. 159 (1936). The provision of the constitution with respect to leases of tribal property is in terms as applicable to oil leases as to any other leases. The constitution was adopted at a time when the attention of the Blackfeet Tribe was focused upon the tribe's oil resources. Oil had been discovered within the boundaries of the Blackfeet Reservation on September 28, 1932. By June 30, 1936, 44 producing wells had been drilled within the reservation. The constitution and the charter contain specific references to oil leases. The drilling agreements here involved are nonetheless leases (indeed they are so characterized by petitioners' attorney in the letter transmitting the petition) because they provide for net royalties as well as gross royalties. While these agreements undoubtedly partake of the nature of joint adventures there is no incompatibility between a joint adventure and a lease.

Under these conditions we think the Superintendent of the Blackfeet Reservation acted within the scope of his authority in rejecting these agreements, which had been negotiated, as the record shows, without according adequate opportunity for the exercise of Indian preference rights.*

* A memorandum dated September 18, 1942, to Assistant Secretary Chapman from Assistant Solicitor Flanery indicates that the preference provisions of the Blackfeet Constitution may be satisfied, even without formal posting of notices, where the Tribal Council certifies that members of the tribe have had a fair opportunity to make preference claims and have refrained from doing so. In the case at bar, however, neither petitioners nor the Tribal Council have taken the position that adequate opportunity for the assertion of preference claims was allowed prior to July 21. That position was suggested by delegates of the Council in departmental discussions in April, which accounts for the silence of the departmental memorandum of May 12 on the subject of preference rights. But evidence presented at the hearing showed that no recognition was given to preference rights until some time in June or July (R. 5, 36). And certainly no opportunity to assert such rights was allowed in the course of reallocating agreements to Petitioners Sederholm and Hanlon.

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(3) In view of the foregoing conclusions, we find it unnecessary to pass upon the validity of the rather minute objections noted in the Superintendent's letter of September 25 to the form of the rejected contracts and accompanying bonds.

The fact that the Superintendent was legally justified, as we hold he was, in refusing to approve the petitioners' contracts in June does not mean that the Secretary of the Interior could not give approval to these contracts at a later time. Had timely application been made for the exercise of the Secretary's supervisory authority, consideration might have been accorded to the petitioners' equities before any question arose of intervening rights of third parties. But no such application was made for three months, and in that period of time the three areas in question had been leased to the respondents and substantial progress had been made in the digging of wells on these tracts. As between petitioners and respondents the question is: Who has prior legal rights?

On August 9, when leases to respondents were approved and became effective, the petitioners did not have valid leases. Their applications for approval of such leases had not been granted and the Superintendent's action in this regard was within the scope of his authority and cannot be disregarded as a nullity. *Anicker v. Gunsburg*, 246 U. S. 110. At best the petitioners had a right to demand that the decision of the Superintendent be reconsidered. But before any such reconsideration was asked, new leases were issued to third parties. These leases are legally perfect in all respects. Their validity does not even depend upon the applicability to these transactions of the preference provisions of the tribal constitution. For even if the Tribal Council was not under a *duty* to do so, it clearly had the *right* to favor tribal members in disposing of tribal property. Particularly did it have the right to favor tribal members where contracts were being allocated without competitive bidding. Therefore, in the face of outstanding valid leases to third parties, it is impossible in this proceeding to grant petitioners the relief sought. *Jones v. Meehan*, 175 U. S. 1; *Noble v. Union River Logging Railroad*, 147 U. S. 165; *Mosgrove v. Harper*, 54 Pac. 187 (Ore.); and see *Kean v. Calumet Canal Co.*, 190 U. S. 452, 461.

The basic issue in this case was decided by the Supreme Court in the case of *Anicker v. Gunsburg*, 246 U. S. 110 (1918), where the Court upheld the power of the Secretary to approve a lease filed subsequently to the filing of the appellant's lease, declaring:

The statute is plain in its provisions—that no lease, of the character here in question, can be valid without the approval of the Secretary. Such approval rests in the exercise of his discretion; unquestionably this authority was

given to him for the protection of Indians against their own improvidence and the designs of those who would obtain their property for inadequate compensation. It is also true that the law does not vest arbitrary authority in the Secretary of the Interior. But it does give him power to consider the advantages and disadvantages of the lease presented for his action, and to grant or withhold approval as his judgment may dictate.

There is nothing in this record to show that approval of the appellant's lease has been given by the Secretary as required by the statute. On the contrary, it appears that the Secretary approved another lease of the same land, and has withheld his approval of the one under which the appellant claims. The Secretary declares in substance in the finding which we have quoted, being his final action in the case, that the prior recording of one lease does not abridge his authority to find that another lease, regularly executed and filed, is more to the allottee's interest and better entitled to approval. It does not appear that had he disapproved the Gunsburg lease, he would have approved the one to appellant, and, until this affirmatively appears, appellant has no standing which permits a court by its decree to award the leasehold to him.

We find nothing in this record to indicate that the Secretary of the Interior has exceeded the authority which the law vests in him. The fact that he has given reasons in the discussion of the case, which might not in all respects meet with approval, does not deprive him of authority to exercise the discretionary power with which by statute he is invested. *United States ex rel. West v. Hitchcock*, 205 U. S. 80, 85, 86. [At pp. 119-120]

While the petitioners must therefore be denied the relief they have sought in this proceeding, it appears that at least one of them is equitably entitled to relief at the hands of the Department and the Blackfeet Tribe. Petitioner A. B. Cobb was one of the first parties to apply for an oil drilling agreement under the Teter contract. The records of the Blackfeet Tribal Business Council show that his application for this tract is dated February 24. The area originally assigned him was reassigned to him under the revised contract form in June and the reassignment was confirmed by vote of the Tribal Council on July 1. (Findings of Fact, pars. 11-12, 25.) On July 14 he was advised by representatives of the Council that his contract was valid (*ibid.*, par. 27) notwithstanding the fact that these representatives of the Council apparently knew at the time that the Department considered the membership preference provisions of the constitution applicable and that the Superintendent refused to approve petitioner's contract until action had been taken in conformity with these provisions. With these assurances from the Council and the Council's agent, Petitioner Cobb expended considerable sums of money to prepare for drilling. True, he took a chance—as an old operator on the reservation he knew that the Council could not grant a lease over the Superintendent's objection—and the chance turned sour when the Council awarded the land to a member of the tribe. But it was a chance based upon confidence in the good faith of the

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Tribal Council and all its members. The loss that petitioner suffered would not have been suffered if the Council, the Superintendent, and the Department had distinctly proclaimed at the outset that no oil drilling agreements would be awarded to nonmembers without prior posting for members' preference claims. The loss might not have been suffered if, since this had not been done, the Tribal Council had then stood by its original position and had refused to lease this tract to respondent Grace Hagerty or had persuaded said respondent to accept another tract instead of petitioner's, in order to safeguard the Council's reputation for fair dealing and to make it possible for the Council to stand by its original bargain. Equally, the petitioner's loss might not have occurred if the Superintendent or the Department had taken timely steps to deny approval to the conflicting lease. The petitioner's difficulties are an unfortunate, but perfectly natural, consequence of a new experimental procedure in oil leasing. They are not the result of malice or illegal action. They involve the sort of chance and the sort of loss that anybody in the business of oil drilling must be prepared to take. If the Department were limited to granting petitioner the relief he might have in a court of law, it could not redress such a loss. But in view of the fact that the Department is not so limited in its action, it may, without interfering with the vested rights of respondents, take other measures for the relief of the petitioner, the moral basis of which attorney for respondents does not deny (R. 28-29). It is accordingly recommended that the following action be taken on the petition of A. B. Cobb:

The petition is dismissed on condition that the Blackfeet Tribal Business Council shall, within 60 days of the approval of this decree, allow Petitioner A. B. Cobb a right to select, from the otherwise undisposed of tracts posted on July 21 for Indian preference claims on which no such claims were filed, a tract of 160 acres, and to receive a lease thereon identical, except for location, with those heretofore approved.

Inasmuch as Petitioners Hanlon and Sederholm do not show equivalent equities, their petitions are dismissed without qualification. This will leave the Tribal Business Council free to decide on its own responsibility whether it should permit Petitioner Sederholm, Petitioner Hanlon, Petitioner Sederholm's predecessor in interest, Everett Crumley, or any other parties who have in good faith relied upon the pledged word of the Council to their disadvantage, to secure oil drilling agreements in the approved form on tracts for

which members' preference claims were not filed after the allowance of fair opportunity to do so. Except as above qualified, the petition for the exercise of the Secretary's supervisory authority is

Denied.

Approved:

HAROLD L. ICKES,
Secretary of the Interior.

STATUS OF TITLE TO MINERAL RIGHTS IN THE WATERLOO RECREATIONAL DEMONSTRATION AREA, MICHIGAN

Opinion, April 3, 1944

MINERAL RIGHTS—OIL AND GAS LEASES ON CONVEYED PARK LANDS—ACT OF JUNE 6, 1942—POWER OF TERMINATION—DILIGENCE REQUIRED OF DEPARTMENT—EFFECT OF REAL OR SUBSTANTIAL VIOLATION OF CONDITIONS.

Title to the minerals underlying lands within the Waterloo Recreational Demonstration Area was conveyed to the State of Michigan by the United States subject to the conditions and provisions contained in the act of June 6, 1942 (56 Stat. 326), and in the deed. The United States holds a possible power of termination, which upon breach of the conditions contained in the deed becomes a vested power of termination. The Department should exercise diligence by notifying the Secretary of any real or substantial violation of the conditions by the State of Michigan in order to protect the interests of the United States.

HARPER, *Solicitor*:

You have presented for my consideration the question whether the State of Michigan is authorized to grant leases for oil and gas exploration and development on lands conveyed by the United States to the State, pursuant to the act of June 6, 1942.¹ This statute authorizes the Secretary of the Interior, with the approval of the President, to convey to the States recreational demonstration projects transferred to him by Executive Order No. 7496 for public park, recreational and conservation purposes. The provisions of the legislation essential to the solution of the question under consideration are as follows:

SEC. 3. * * * Every such deed or lease shall contain the express condition that the grantee or lessee shall use the property exclusively for public park, recreational, and conservation purposes, and the further express condition that the United States assumes no obligation for the maintenance or operation of the property after the acceptance of such deed or during the term of such lease, and may contain such other conditions not inconsistent with such

¹ 56 Stat. 326.

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express conditions as may be agreed upon by the Secretary and the grantee or lessee: *Provided*, That the title and right to possession of any lands so conveyed or leased, together with the improvements thereon, shall revert to the United States upon a finding by the Secretary, after notice to such grantee or lessee and after an opportunity for a hearing, that the grantee or lessee has not complied with such conditions during a period of more than three years, which finding shall be final and conclusive, and such lands and improvements thereon, upon such reversion to the United States, shall be returned to the jurisdiction of the Department of the Interior and upon determination of the Secretary may be considered as surplus real property to be disposed of in accordance with the Act of August 27, 1935 (49 Stat. 885).

The Secretary executed a quitclaim deed on June 4, 1943, which was approved by the President on June 7, 1943. It appears that the State of Michigan accepted the grant which contained the following conditions imposed by the act of June 6, 1942:

Provided always, that this deed is made upon the express condition that the State of Michigan shall use the said property exclusively for public park, recreational, and conservation purposes, and the further express condition that the United States of America assumes no obligation for the maintenance or operation of the said property after the acceptance of this deed;

Provided further, that the title and right to possession of said lands, together with the improvements and equipment thereon, shall revert to the United States of America upon a finding by the Secretary of the Interior, after notice to the State of Michigan and after an opportunity for a hearing, that the said State has not complied with the aforesaid conditions during a period of more than three years, which finding shall be final and conclusive.

It seems to be the well-settled law of Michigan that a grant of title to land includes all minerals beneath the surface unless they are reserved by the grantor.² Oil and gas are minerals.³ Neither the act of June 6, 1942, nor the deed to the State of Michigan contains reservations of oil and gas. The State, therefore, acquired all subsurface minerals which were formerly owned by the United States.

I am of the opinion that the State of Michigan is authorized to grant oil and gas leases because it acquired a fee simple title even though the estate conveyed is, from a technical standpoint, an estate upon condition subsequent, which is subject to forfeiture for breach of the condition.⁴ All that now remains in the Government is a

² *Central Land Co. v. City of Grand Rapids*, 302 Mich. 105, 4 N. W. (2d) 485 (1942), accord: Op. Sol. M. 28942, February 10, 1937; 39 Op. Atty. Gen. 39 (1937).

³ *Ohio Oil Co. v. Indiana*, 177 U. S. 190 (1900).

⁴ See note 2, *supra*; Restatement, Property (1936), secs. 14 and 45; Op. Sol. M. 27755, October 18, 1934.

possible power of termination,⁵ in the event the condition subsequent is broken. The mere breach of the condition does not result in a forfeiture of the property. After the breach of the condition the right to terminate the estate, which was only a possible right before, becomes a vested power of termination by virtue of which the Government could, after the hearing prescribed by the act of June 6, 1942, exercise the powers of termination bringing the conditional estate to an end.⁶ The State of Michigan has therefore the right to exercise any act incident to ownership as if the condition did not exist.⁷

Whether any exploration or production under an oil and gas lease by the State of Michigan would interfere or conflict with the use of the land for public park and recreational and conservation purposes specified in the act of June 6, 1942, and the grant by the United States so as to warrant the declaration by the United States of a forfeiture is a question of fact for the administrative determination of the Secretary.⁸ Such action on the part of the State would, however, give the Government a power of termination if the Secretary of the Interior should determine that the State of Michigan has not complied with the conditions after a hearing, as provided by the act of June 6, 1942. Since the courts do not favor forfeitures, the act constituting a breach for which a forfeiture will be enforced must be substantial as distinguished from a merely technical breach; it must be in violation of the true purpose and intent of the condition.⁹

Before any development for the production of oil or gas, within the Waterloo Recreational Demonstration Area, is undertaken by the

⁵ Restatement, Property (1936), sec. 24. An interesting explanation of the reason for the use of "power of termination" instead of "right of entry" appears in the Special Note: "The interest herein described as a 'power of termination' frequently is referred to as a 'right of entry.' This latter term is not used in this Restatement for two reasons. In the first place, the interest of the person in whose favor the condition exists is not a 'right' as that word is defined in sec. 1. It is a 'power' as that word is defined in sec. 3. In the second place, under modern law, an entry is normally not necessary in order to terminate the interest subject to the condition. Even if the instrument creating the condition expressly reserves to the conveyor a 'power to enter and to terminate' the estate created, no entry is essential. The interest subject to such a power is terminated by any appropriate manifestation, upon the part of the person in whose favor the condition exists, of his intent thereby to terminate the interest in question."

⁶ Restatement, Property, sec. 45.

⁷ Op. Atty. Gen., *supra*, note 2, at pp. 41, 42, citing *Schulenberg v. Harriman*, 21 Wall. 44 (1874); *Vail v. Long Island R. Co.*, 106 N. Y. 283, 12 N. E. 607 (1887); *Methodist Protestant Church of Henderson v. Young*, 130 N. C. 8, 40 S. E. 691 (1902); *Leavenworth, etc. R. R. Co. v. United States*, 92 U. S. 733 (1875); *Lake Superior etc. Co. v. Cunningham*, 155 U. S. 354 (1894); *New York Indians v. United States*, 170 U. S. 1 (1898).

⁸ Op. Atty. Gen., *supra*, note 2, at p. 42.

⁹ *Central Land Co. v. City of Grand Rapids*, 302 Mich. 105, 4 N. W. (2d) 485 (1942), cited *supra*, note 2; *Rose v. Hawley*, 141 N. Y. 366, 36 N. E. 335 (1894); *Riggs et al. v. Pursell et al.*, 66 N. Y. 193 (1876); *Carter v. Branson*, 79 Ind. 14 (1881).

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State or by any lessee thereof, it is suggested that the State submit the details of the proposed plan of development, including the particular location of any test well, for administrative consideration by the Secretary in the light of the prevailing circumstances. This procedure would enable the State to learn in advance whether the contemplated development would result in a breach of the condition subsequent, which is set forth in the deed and the statute.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

BERT O. PETERSON, MIDWEST HOLDING COMPANY, MAUDE L. BROWN

*Decided April 3, 1944**

STATUTORY CONSTRUCTION—ACT OF FEBRUARY 25, 1920, AS AMENDED AUGUST 21, 1935—CANCELATION OF OIL AND GAS LEASES—NOTICE OF CANCELATION.

The requirements of section 17 of the act of February 25, 1920, as amended August 21, 1935, which prescribe a 30-day notice of intent to cancel an oil and gas lease to the "lease owner," are met by service of such notice upon the record titleholder of the lease.

STATUTORY CONSTRUCTION—ACT OF FEBRUARY 25, 1920, AS AMENDED AUGUST 21, 1935—CANCELATION OF OIL AND GAS LEASES—"LEASE OWNER."

The language of section 17 of the act of February 25, 1920, as amended August 21, 1935, its legislative history and the practical construction given it by the Department offer no support for the contention that the "lease owner" who is entitled to notice of cancellation of the lease, includes anyone interested in the substance of the lease who has communicated that fact to the General Land Office and obtained its approval of the same.

STATUTORY CONSTRUCTION—OIL AND GAS LEASES—APPROVAL OF OPERATING AGREEMENT.

The approval by the Secretary of the Interior of an agreement between the lessee and an operator does not give rise to a contractual relationship between the United States and the operator or create any privity of contract between the United States and the operator even though the agreement binds the operator to fulfill the lessee's obligation under the lease.

STATUTORY CONSTRUCTION—ACT OF FEBRUARY 25, 1920, AS AMENDED AUGUST 21, 1935—CANCELATION OF OIL AND GAS LEASES—FORFEITURES.

Forfeitures of oil and gas leases are favored by the law and provisions for forfeiture are construed liberally in favor of the lessor and strictly enforced.

* Peterson and Midwest brought an action to vacate the above decision, but the Court of Appeals of the District of Columbia, in *Peterson v. Ickes*, 151 F. (2d) 301 (1945), affirmed the decision of the District Court dismissing the action. Certiorari was denied by the United States Supreme Court, 326 U. S. 795.

STATUTORY CONSTRUCTION—ACT OF FEBRUARY 25, 1920, AS AMENDED AUGUST 21, 1935—CANCELATION OF OIL AND GAS LEASES—ABANDONMENT OF NOTICE.

The statutory requirement of 30 days' notice before cancellation of an oil and gas lease does not require cancellation 30 days after notice has been given nor does the Department's failure to cancel immediately after the lapse of 30 days constitute abandonment of the notice.

OIL AND GAS LEASES—NOTICE OF CANCELATION—ACTUAL NOTICE.

The failure to serve notice of cancellation of a lease in the manner prescribed by statute upon an operator in possession of the premises under an agreement with the lessee, is immaterial when the operator has actual notice of cancellation for the period prescribed by statute; even if the statute could be interpreted as requiring notice to such operator.

OIL AND GAS LEASES — CANCELATION OF LEASES — EQUITIES JUSTIFYING REINSTATEMENT.

An operator who fails to show any actual expenditure of money or effort in the development of leased land cannot be regarded as having such equities in the land as to justify reinstatement of the lease after cancellation.

CHAPMAN, *Assistant Secretary*:

This is an appeal by the Midwest Holding Company from the decision of the Commissioner of the General Land Office of October 23, 1943, denying its application for reinstatement of the oil and gas lease, Cheyenne 045174, of 440.46 acres of land in Park County, Wyoming, to Bert O. Peterson, dated December 31, 1938.

On August 24, 1926, Peterson filed his application for an oil and gas prospecting permit on certain Wyoming lands under the Mineral Leasing Act of February 25, 1920 (41 Stat. 437, 30 U. S. C. sec. 221), together with evidence of a power of attorney to act for him given to John Wight of Billings, Montana. A permit was issued to him dated November 26, 1929. Thereafter, on August 20, 1937, Peterson entered into an operating agreement with the Midwest Holding Company which gave the Company the right to develop the permit lands for oil purposes and bound it to pay all costs and expenses of development including rentals and costs of bonds. The Company promised to pay to Peterson certain royalties on the oil produced in return for these privileges. The Department approved this agreement on April 8, 1938. On September 7, 1937, the Midwest Holding Company assigned its operating agreement to the Sha-Wa Petroleum Corporation and on June 16, 1938, the Department approved this assignment and three amendments thereto. On December 29, 1938, the Sha-Wa Corporation, acting in behalf of Peterson, filed an application for a lease in exchange for the permit pursuant to the exchange provisions of the amendatory act of August 21, 1935. A lease of the land covered by the permit, dated December 31, 1938,

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was issued to Peterson. The lease provided for a term of 5 years, but reserved no rental for the first two years because the land was not within a known oil or gas structure. For the last 3 years of the lease term an annual rental of \$110.25 was specified.

When the rental for the third year became due on January 1, 1941, it was not paid. Accordingly, on June 12, 1941, the Commissioner of the General Land Office, acting through the register of the local land office at Cheyenne, Wyoming, notified Peterson by registered mail of the delinquency and informed him that the lease would be recommended for cancelation unless payment were made within 30 days. Peterson's counsel wrote the register at Cheyenne, stating that the rental due on Peterson's lease should be paid by John Wight of Billings, Montana; that he had written Mr. Wight asking him to take care of it, but if Wight did not do so "right away," Peterson would. He requested that no adverse action be taken for a reasonable length of time in order that the matter might be adjusted. On December 6, 1941, the Commissioner wrote Peterson that the lease had been recommended for cancelation and informed him that he, as lessee, would be held liable for the third year's rental notwithstanding the cancelation. The lease was canceled on December 30, 1941, and on January 13, 1942, Peterson was notified by the Department of this action. The delinquent rental was subsequently paid.

On February 11, 1942, Maude L. Brown filed an application for an oil and gas lease, Cheyenne 066572, of the land formerly embraced in the Peterson lease. On November 6, 1942, the Commissioner wrote Mrs. Brown's counsel that the register at Cheyenne had been instructed to request Mrs. Brown to pay the first year's rental of \$220.50 and that when this rental had been paid, the lease forms would be sent for execution. Mrs. Brown paid the first year's rental on December 1, 1942, but before the lease was executed, the Midwest Holding Company telegraphed the Land Office, protesting the cancelation of Peterson's lease and requesting that action on any pending lease application be withheld until it could file further showing. On January 26, 1943, the Midwest Company and Peterson filed a formal application for reinstatement of the canceled lease.

On October 23, 1943, after both the Midwest Company and Mrs. Brown had fully presented and argued their conflicting contentions, the Commissioner denied the application for reinstatement. The Midwest Company has appealed, alleging that the attempted cancelation of the Peterson lease was unlawful because not in accordance with the terms of the controlling statute (act of August 21, 1935, 49 Stat. 674, sec. 17, 30 U. S. C. sec. 226), in that (1) no notice of cancelation was given to the Midwest Holding Company; (2) the notice to

Peterson on June 12, 1941, was abandoned and no subsequent notice was given; and (3) the equities of the case are such that even if the statutory notice had been given, the lease should be reinstated to protect the interests of the Midwest Holding Company.

I

The statutory authority under which the Department acted is contained in section 17 of the act of February 25, 1920, as amended by the act of August 21, 1935 (49 Stat. 674, 678, 30 U. S. C. sec. 226), which provides that—

Any lease issued after the effective date of this amendatory Act under the provisions of this section, except those earned as a preference right as provided in section 14 hereof, shall be subject to cancellation by the Secretary of the Interior after thirty days' notice upon the failure of the lessee to comply with any of the provisions of the lease, unless or until the land covered by any such lease is known to contain valuable deposits of oil or gas. Such notice in advance of cancellation shall be sent the lease owner by registered letter directed to the lease owner's record post-office address, and in case such letter shall be returned as undelivered, such notice shall also be posted for a period of thirty days in the United States Land Office for the district in which the land covered by such lease is situated, or in the event that there is no district land office for such leased land, then in the post office nearest such land. Leases covering lands known to contain valuable deposits of oil or gas shall be canceled only in the manner provided in section 31 of this Act.

The applicability of this section to the Peterson lease is undisputed; the default in payment of rental is undisputed. Appellant's case for reinstatement is predicated upon the contention that the notice of cancellation which was given does not meet the requirements of the statute. It first contends that the term "lease owner" as used in the statute is intended to include "anyone interested in the substance of the lease whether by direct assignment, sublease, operating agreement, or any other similar instrument, which has the approval of the General Land Office and is there filed * * *" so that all such persons are entitled to the statutory notice of cancellation. It argues that because the statute directs that notice of cancellation on account of the lessee's default shall be sent to the lease owner, it is clearly intended that some person other than the lessee shall be notified, and on the basis of numerous judicial definitions of the term "owner" as applied to various types of property, concludes that as used in the statute applicable to this case "lease owner" should be construed to include any person who possesses a legal or equitable interest in the leasehold estate and has notified the General Land Office of this interest. The Commissioner held that the lease owner is the record title owner of the lease, who may be either the lessee himself or an assignee, and pointed out that appellant did not qualify as an assignee of the

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lease by execution of the operating agreement with Peterson, the lessee, since Peterson did not part with his entire interest in the lease; that appellant has no contract with the United States and no privity with the United States; and that in any event appellant was not entitled to notice for the reason that it had transferred its rights under the operating agreement to the Sha-Wa Petroleum Corporation.

We see no reason for disturbing the Commissioner's conclusion in this respect. It is well established that the reservation of an overriding royalty makes a contract transferring the lessee's right to enter and develop the land covered by his oil and gas lease a sublease rather than an assignment of the lease. *Sunburst Oil & Refining Co. v. Callender*, 84 Mont. 178, 274 Pac. 834 (1929); *Roberson v. Pioneer Gas Co.*, 173 La. 313, 137 So. 46 (1931); *Hartman Ranch Co. v. Associated Oil Co.*, 55 P. (2d) 1280 (Calif. App. 1936).

The Department's approval of the operating agreement between Peterson and appellant by which appellant bound itself to fulfill the obligations of the lease, including the payment of rental, did not give rise to a contractual relationship between appellant and the United States or create any privity of contract between them. *Armstrong v. McKanna*, 50 L. D. 610 (1924); *Cedar Creek Oil & Gas Co. v. Archer*, 112 Mont. 477, 117 P. (2d) 265 (1941). The approval of the operating agreement indicated merely that the Secretary recognized the operator as a qualified driller who might, after discovery, acquire an interest in the lease and that there was nothing in the agreement in conflict with the terms of the lease. The approval of an assignment of a lease is, however, an acceptance of the assignee's obligation as a substitute for that of the lessee and results in the creation of a contractual relationship between the assignee and the United States. Hence, it is apparent that the term "lease owner" is in effect legal shorthand used for the sake of brevity. Had not this term been employed it would have been necessary to phrase the statute in these words:

Such notice in advance of cancelation shall be sent to the lessee, or to the successor of the lessee whether by an assignment of the lease approved by the Secretary of the Interior, or by operation of law, by registered letter directed to the lessee or his successor at his record post-office address.

It is immaterial that under the terms of the operating agreement appellant might at any time have demanded an assignment of the permit or of a subsequently issued lease. It made no such demand and no assignment to it was ever made and approved by the Secretary. In no sense, therefore, can it be said that the appellant was a lease "owner."

Appellant contends that the term "lease owner" should be construed to include anyone interested in the substance of the lease, who has communicated that fact to the General Land Office and has obtained its approval. There is nothing in the language of the statute or in its legislative history which supports this construction. On the contrary, so far as the words of the statute are concerned, they clearly and unambiguously confine the category of persons who are to receive notice to those who are owners of the lease. This means either the original lessee or someone who has succeeded him as lessee. And this is the practical construction which this Department has given the statute. In the eight years which have elapsed since this statute was enacted, several thousand oil and gas leases have been canceled pursuant to the authority granted therein. In all these cases, the Land Office has sent notice of cancelation to only the record titleholders. However, even if the construction for which appellant contends were applicable, it would necessarily apply to the Sha-Wa Corporation and not to appellant.

Appellant further contends that the cancelation provision of section 17 is a remedial statute and that, therefore, the broadest and most liberal construction must be given to the language defining the persons to be affected thereby. It is by no means clear that this statute is a remedial statute, but it is clear that if it is to be considered as such, the remedy created thereby is the remedy of the United States and not of the persons who may be interested in oil and gas lands. It follows that any liberality of construction which should be indulged in must necessarily be in favor of the exercise of the authority to cancel. There is no comfort for appellant in such reasoning.

The statute which governs this case authorizes a forfeiture, but it is not subject to the familiar rule that forfeitures are viewed with disfavor and will be enforced only when circumstances require it. The courts have held that in connection with oil and gas leases, forfeitures are favored by the law so that such leases are to be construed liberally in favor of the lessor and provisions for forfeiture strictly enforced. *Huggins v. Daley*, 99 Fed. 606, 612 (C. C. A. 4, 1900); *Berthelote v. Loy Oil Co.*, 28 P. (2d) 187, 190 (Mont., 1933); *Martin v. Pacific Southwest Royalties*, 106 P. (2d) 443, 448 (Calif. App., 1940); *Stanokind Oil & Gas Co. v. Guertzen*, 100 F. (2d) 299, 301 (C. C. A. 9, 1938). In these circumstances, we find no occasion for application of appellant's theory and we conclude that the notice to Peterson completely satisfied the statutory requirements.

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II

Likewise, there is no merit in appellant's further contention that the notice to Peterson, even if sufficient, was ineffective because it was abandoned. Appellant argues that the statute requires 30 days' notice; that no action was taken in response to the notice to Peterson in June 1941; and that the attempted cancelation on December 30, 1941, was void because it occurred less than 30 days after the notice of December 6, 1941. Appellant thus assumes that cancelation must follow exactly 30 days after notice and that a failure to cancel after lapse of 30 days connotes an abandonment of the notice. There is nothing in the statute which supports this view. The statute requires a minimum of 30 days between the giving of notice and the cancelation of a lease, but it does not preclude the lapse of a more extended period of time. Hence, it cannot be said that there was abandonment of the notice merely because cancelation was delayed beyond the minimum prescribed by the statute.

Furthermore, there is nothing in the circumstances of this case which in any way indicates any abandonment of the purpose expressed in the letter of June 12, 1941. Peterson was informed by that letter that the lease would be recommended for cancelation unless the delinquent rent was paid within 30 days. In response to this announcement, Peterson's attorney wrote the Land Office at Cheyenne that he had asked Wight to take care of the matter but that "If Wight doesn't take care of this rent right away, Mr. Peterson intends to take care of it. Will you please set your files ahead a reasonable length of time to give us a chance to get this straightened out?" This is both a request for additional time and a promise to act within a reasonable period of time. It imposed no obligation upon the Land Office to delay its recommendation for cancelation beyond the 30-day period mentioned in its letter to Peterson, but did promise action which would make cancelation unnecessary. This assurance and the fact that the rental due January 1, 1941, was an advance payment for the year 1941, are sufficient explanation for the failure to cancel the lease before the end of the lease year. There was nothing which called for any response by the Land Office to the letter from Peterson's counsel. But Peterson had a duty to report within a reasonable time of the success or failure of his attempt to induce Wight to pay the delinquent rent and to make good his promise to take care of it if Wight did not. Appellant's argument that by the silence of the Land Office, Peterson was led to assume that notice had reached John Wight or Midwest Holding Company and that the rent had been paid, is not justified by the facts. The De-

partment was not precluded from proceeding with the cancellation of the lease either because it had done anything which might have induced Peterson to believe that it had abandoned the intent expressed in the letter of June 12, 1941, or because it had permitted the time for cancellation to elapse.

III

We are in agreement with the Commissioner's conclusion that the controversy over the want of official notice is immaterial in view of the fact that the Midwest Holding Company had actual notice of the intent to cancel the Peterson lease. The record shows that on June 2, 1941, the Mondakota Development Company through its President, C. H. Braden, wrote to the Commissioner of the General Land Office, inquiring as to the status of the Peterson lease and the amount of the rental due, and requesting that cancellation be withheld if such action had not already been taken. The Company was informed by letter of June 12, 1941, that the third year's rental in the amount of \$110.25 was due on the Peterson lease and unpaid, and a copy was enclosed of the letter of June 12, 1941, to Peterson, advising him that the lease would be recommended for cancellation if the rent was not paid within 30 days. E. A. Wight, a brother of John Wight, was then Secretary-Manager of the Midwest Holding Company and Treasurer of the Mondakota Development Company. The two companies had combined offices in the Heddon Building at Billings, Montana.

The record also shows that a registered letter addressed to Midwest Holding Company sent from Armstrong, Iowa, by Bert O. Peterson, was received at the post office at Billings, Montana, on July 28, 1941, and that it was delivered to E. A. Wight on August 1, 1941. In Peterson's affidavit which was filed with the application for reinstatement of the lease, he stated that at or about July 14, 1941, he sent a letter to John Wight at Billings, Montana, advising Wight of the notice which he had received from the Land Office, but declared that this letter was returned unclaimed and did not reach John Wight or Midwest Holding Company. He did not give the date when this letter was returned to him although he stated positively that his subsequent letter to Wight was returned on January 5, 1942. Later, after his statements had been challenged, he filed the statement of the Acting Postmaster at Armstrong, Iowa, where the letters were mailed, that another registered letter mailed December 12, 1941, addressed to John Wight was returned to Peterson, the sender, on January 5, 1942, but he did not submit any proof of the return of the July letter. The records of the Postmaster at Billings,

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Montana, show the receipt of a letter from Bert O. Peterson to Midwest Holding Company on July 28, 1941, and the delivery of this letter to E. A. Wight, on August 1, 1941. These records also show the receipt and the return to the sender of Peterson's December letter to Wight. The post office records show no other registered letter from Peterson to Wight during 1941. We find therefore that Peterson was mistaken in his statement that his letter of July 1941 was returned to him, and that in fact this letter was received by the Secretary-Manager of the Company to which it was addressed. Peterson has admitted that this letter conveyed complete information of the notice he had received from the Land Office in regard to the overdue rent on his lease.

The record further shows that on September 17, 1941, the Standard Surety & Casualty Company of New York, through B. W. Fisk, a representative of its Fidelity & Surety Department, wrote a letter addressed to John Wight, Midwest Holding Company, Billings, Montana, informing him that it had received notice from the Land Office that the rental for 1941 on the Peterson lease was due and unpaid and requesting information as to what steps he had taken to see that it was paid.

We find that appellant Midwest Holding Company did have actual notice of the impending cancelation for more than 30 days prior to the cancelation of the Peterson lease. We have indicated that such notice is not required by the statute, but if it were, we think the fact of notice has been shown.

IV

Appellant's contention that it is entitled to reinstatement because of its equities in the lease is based upon the assertion that over a period of years it has expended a considerable amount of effort and about \$65,000 in the development of the leased land. The record discloses that appellant entered into operating agreements with the permittees of adjoining land, Peterson and Dengler, with some intent to develop the two tracts as a unit. Peterson's permit lands lay in Wyoming; Dengler's, in Montana. Shortly thereafter, appellant assigned both agreements to the Sha-Wa Petroleum Corporation. The Sha-Wa Corporation did some drilling on the Dengler lands, but did not produce a commercial well. Subsequently, the Midwest Company brought suit in a Montana State court and obtained judgment annulling its contract with the Sha-Wa Corporation as to the Dengler land because of its failure to drill to the depth required by the contract. It alleges that it contemplates like action in regard to the Peterson lands, but had not done so at the time of the Commis-

sioner's decision. There is nothing in the record which shows that appellant spent anything in the exploration and development of the Peterson lands and the record shows affirmatively that at the time of default and cancelation appellant had no interest in anything that pertained to the lease beyond the consideration for the assignment of its operating rights to the Sha-Wa Corporation which was payable in installments and contingent upon discovery and production of oil. In these circumstances, we find no equities in appellant which justify reinstatement of the lease.

The decision of the Commissioner is

Affirmed.

UNITED STATES v. DAWSON

Decided April 12, 1944

PRACTICE—RULES OF PRACTICE—43 CFR 216.18, 221.53, 221.57—LIABILITY OF CONTEST PARTY FOR COSTS OF TAKING TESTIMONY—DEPOSIT FOR COSTS.

Under departmental Rules of Practice each party to a contest is liable for payment of the costs of the record he makes and must make a deposit to cover such costs before the contest hearing is held. A contestee who refuses to make such deposit is not entitled to offer evidence, to participate in the hearing or even to introduce into the record any papers which require notation.

PRACTICE—ABSENCE OF HEARING OFFICER DURING CONTEST HEARING.

The absence of an officer before whom a hearing is held during the taking of testimony does not affect the regularity of the proceedings so long as the officer is present when any rulings are made in which the objecting party is concerned.

PRACTICE—RULES OF PRACTICE—43 CFR 205.4, 221.15—REGISTER'S DISCRETIONARY AUTHORITY TO FIX THE TIME AND PLACE OF HEARING.

Under departmental Rules of Practice the register has authority to fix the time and place of a contest hearing and his action will not be interfered with unless he exceeds his authority. It is not abuse of discretion to fix a place for hearing at which witnesses living in the vicinity of the lands in controversy can be compelled to attend by subpoena.

PRACTICE—REGISTER'S DISCRETIONARY AUTHORITY TO GRANT CONTINUANCES.

The granting or denial of a request for continuance is within the discretionary authority of a hearing officer. It is not abuse of such discretion to deny a request for continuance on the ground of illness in the requesting party's family when there is no showing that such illness was the cause of the party's absence from the hearing; it is not abuse of such discretion to deny request for continuance on the ground that the requesting party is engaged in national defense work when there is no showing that the party was prepared or intended to offer testimony at the hearing.

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RECLAMATION WITHDRAWAL—ACT OF JUNE 17, 1902—ACT OF JUNE 25, 1910, AS AMENDED AUGUST 24, 1912—MINING LOCATIONS ON WITHDRAWN LANDS.

First form withdrawals of public land under the act of June 17, 1902, for reclamation purposes preclude location under the mining laws and withdrawals under the subsequent act of June 25, 1910, as amended August 24, 1912, permit only location of claims valuable for metalliferous minerals. Pumice is a nonmetalliferous mineral and land withdrawn under either of the acts noted above is not subject to location of claims valuable for pumice.

MINERAL LOCATION—DISCOVERY OF MINERAL.

A discovery of mineral which will validate a location under the mining laws must show that the land is more valuable for the removal and marketing of the mineral than for any other purpose; that the removal and marketing will yield a profit or that the mineral exists in such quantity as to justify a prudent man in expending labor and capital to obtain it.

MINERAL LOCATION—DISCOVERY OF MINERAL IN NATIONAL FOREST—QUALITY OF PROOF.

When mining claims are located on lands within a national forest and embrace desirable recreational areas the showing of mineral values must be clear and unequivocal.

MINERAL LOCATION—MILL SITES—CLASSES OF MILL SITES.

Under section 2337, Rev. Stat., 30 U. S. C. sec. 42, two classes of mill sites may be located: those used in connection with mining operations on a vein or lode and those not connected with a vein or lode upon which quartz mills or reduction works are located.

CHAPMAN, *Assistant Secretary*:

L. G. Dawson and Mary Dawson have appealed from a decision of the Commissioner of the General Land Office, rendered June 30, 1943, which affirmed the decision of the local register of the district in holding null and void their lode mining locations, namely, Nos. 1, 3, 4, 5, 7, 8, 9, 10, involved in contest No. 1376, and No. 6, the L. G. Dawson, Nos. 11, 12, 13, 14, 15, 16 and 17, involved in contest No. 1377. The locations, made either on April 1, 1940, or on later dates, were on account of allegedly valuable deposits of pumice and embrace lands within the Deschutes National Forest in Klamath County, Oregon. Claim No. 11 is described in the location notice as a mineral-bearing lode or vein and is in the form of a lode claim of maximum dimensions, but in the responses to the charges it is claimed as a mill site. The record title to these claims is in L. G. Dawson, except as to No. 1 in which his wife is a joint locator. The register's decision was rendered upon the record made at hearings on protests filed by the Forest Service. The claimants have filed 16 specifications of error in the form of contentions that under the procedure followed at the

hearings, which was allegedly in violation of the Rules of Practice, they were deprived of their right to submit testimony; that certain reservations or withdrawals mentioned by the Commissioner are not legal obstacles to the location of the land under the mining law, and that there is no conflict with the California-Oregon Military Highway. They also allege that the adverse decision was rendered upon insufficient and immaterial evidence and upon evidence as to mining and mineral subjects adduced from witnesses not qualified to testify on such subjects. They ask for a new trial.

The Commissioner has set forth in considerable detail the history of the proceedings in the case, the status of the land at the time of the location of the claims, the nature and extent of prior use and improvement of the lands involved, and the substance of the testimony as to the mineral character of the land. It would serve no useful purpose to restate facts that are matters of record, the accuracy of which is not disputed. Hence, consideration of the case will be confined to an inquiry as to whether or not the Commissioner's decision was unwarranted by the record in this case.

The record shows clearly that the absence of any evidence on behalf of the defendant, L. G. Dawson, is due to his refusal to comply with the Rules of Practice or to his deliberate disregard of their requirements. When Dawson appeared at the first hearing of contest 1376, on August 25, 1941, the regional law officer of the Forest Service advised him, in the presence of the United States Commissioner before whom the hearing was set, that he was required to deposit \$25 to cover the cost of the testimony he might offer and his cross-examination of the witnesses for the Government. The Commissioner also advised him that it was customary to require defendants to make a deposit to cover the cost of their testimony. Dawson replied, in substance, that he had had no previous notice of such demand; that he was not then in a position to comply and that he would have another hearing and bring all the Government's witnesses there again. He remained at this hearing as an auditor while the further proceedings were conducted without the presence of the Commissioner, who voluntarily absented himself, but because of his failure to make a deposit for costs he was not permitted to participate in the proceedings or to file any papers in the record even though he offered to do so.

The Rules of Practice provide that except in the case of a contestant claiming a preference right, each party must pay the cost of the direct examination of his own witnesses and the cross-examination on his behalf of other witnesses, together with the costs of noting any objections and exceptions made in his behalf (43 CFR 221.53). This rule applies when a hearing is held before another officer than

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the register (par. 288, Circ. 616, 43 CFR 216.27). Registers are required to collect the estimated cost of reducing all testimony to writing from the contesting parties on the date of the hearing before it is held, or the party liable may be required by the register to give security for such costs (43 CFR 216.18, 221.57).

Since it is an invariable rule in proceedings by the Government that each party is liable for the cost of the record he makes, the defendant must be presumed to have knowledge of this rule so that ignorance or want of previous notice constitutes no defense for non-compliance therewith.¹ Dawson, having failed to comply with the demand for the deposit for costs, was according to established practice,² not entitled to participate in the hearing, or even to introduce into the record any papers which would require notation and thus contribute to the cost of the hearing.

The record shows that the register considered the proceedings irregular and that it transmitted the record to the Commissioner without rendering a decision. By decision of January 15, 1942, the Commissioner sustained the demand on defendant for a deposit to secure costs and remanded the case for further hearing, holding that the testimony on the charge of lack of discovery, which the representative of the Forest Service sought to inject into the proceedings on the date of hearing, could not be considered; that certain charges should be eliminated and that the charge of no discovery should be added.

On July 17, 1942, the Forest Service filed another protest against other claims of Dawson (Contest 1377). In their answers denying the charges, the defendants insisted that a hearing, if necessary, be held at Chemult, Oregon, where they resided, because all the physical evidence was there. Dawson further asserted that a hearing was "superfluous."

The regional attorney for the Forest Service objected to the setting of the hearing at Chemult. After consultation with the District Assistant of the Solicitor of the Department of Agriculture and in accordance with the applicable provision of the joint regulations prescribed by the Secretary of the Interior and the Secretary of Agriculture (Circ. 435, par. 4, 43 CFR 205.4), the register set the hearing of the two protests, which were consolidated on motion of

¹ The Rules of Practice were filed with the Division of the Federal Register, embodied in the Code of Federal Regulations, and published in accordance with the Federal Register Act (49 Stat. 500, 502, 44 U. S. C. sec. 307). As to persons affected by these rules this constitutes notice.

² *Hopkins v. Herrmann*, 6 L. D. 599; *Pike v. Thomas*, 8 L. D. 493; *Johnson v. Jackson*, 14 L. D. 91.

the Forest Service, before a United States Commissioner at Klamath Falls, Oregon, on September 20, 1942, and set the date of final hearing before the Commissioner on October 30, 1942. Due and proper notice of the hearings was served on the defendants on August 31, 1942.

On the date set for the hearing before the United States Commissioner, there was no appearance of the defendants or of anyone in their behalf. Dawson sent a telegram that morning to the Commissioner saying that his wife (the codefendant) had been called to San Francisco on account of sickness in the family and that a hearing would be superfluous. At the hearing the Government offered testimony in support of its charges. The defendant gave no notice to the plaintiff or the local land office of any intention to submit testimony at the final hearing.

On October 26, 1942, the register received a letter from L. G. Dawson, saying:

I am leaving in the nex [sic] few days for point of debarkation some where and will be gone during the duration and if and when I get back further hearings can be held but will have to be postponed until such time, in the mean time no damage is being done and no one is getting hurt there is a moratorium on mining assessment, just as well have one on contest.

The register in his decision held that the reasons for defendants' failure to appear at the hearings were insufficient. Subsequently, Dawson offered to submit proof that he was engaged in work of national defense on the date of final hearing.

The specific complaints as to the procedure in the appeal are that the first hearing was presided over by the attorney for the Forest Service and not by the Commissioner; that the defendants were deprived of substantial rights by the register's refusal to set the hearing at Chemult where it was within the power and means of the defendants to produce their evidence; that the defendants were held strictly to compliance with the Rules of Practice, while plaintiff was permitted to ignore them; that defendants have been denied the right to present their evidence fully and adequately.

So far as it appears from the record, the United States Commissioner was present when any rulings were made in which defendant was concerned.³ The absence of the Commissioner during the taking of the testimony affords no basis for questioning the verity or correctness of the record which was transcribed and certified, as required, by the reporter. Defendant was precluded from participating therein by his failure to comply with the rules. The Government was in no way responsible for the *ex parte* nature of the proceeding.

³ See *Empire Trails Inc. v. United States*, 53 F. Supp. 373 (D. C. 1942).

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It has been held that the mere fact that the local officers were not present while the witnesses were testifying in a hearing before them does not affect the regularity of the proceedings. *Deihl v. Clack*, 27 L. D. 425. But if there was any irregularity committed at the first hearing which was prejudicial to the defendant, it was corrected by ordering a new hearing which gave the defendants another opportunity to make full defense.

The regulation above cited (43 CFR 205.4) conferred authority on the register to fix the time and place of hearing, an authority with which he is vested with respect to contests generally, and the Department will not ordinarily interfere with his exercise thereof unless he exceeds his authority. *Mendenhall v. Cagle*, 28 L. D. 50. The hearing was set where witnesses living in the vicinity of the lands in controversy could have been compelled to attend by subpoena.

In determining the place for a hearing, many factors must be considered beside the personal convenience of one of the parties. The claims involved in this appeal are widely scattered over the county and as groups are many miles apart. There is, therefore, no force in the contention that the hearing should have been held in greater proximity to the claims. There is not sufficient reason for holding that the register abused his discretion in fixing the place of hearing at Klamath Falls.

Dawson's wire to the United States Commissioner on the day of hearing was tantamount to a peremptory demand for an indefinite continuance of the case. A request for such continuance should have been addressed to the register, since the officer before whom the testimony is to be taken has no power to continue the case beyond the date set for final hearing. *Erickson v. Way*, 2 L. D. 233. The register was fully justified in holding, when the matter came before him for consideration, that the reason given by Dawson for his nonappearance was insufficient. Motions for continuance are addressed to the sound discretion of the local officers and not subject to review except for an abuse of discretion. *Dayton v. Dayton*, 6 L. D. 164, 165; *United States v. Conners*, 5 L. D. 647; *Chinn v. Cage*, 10 L. D. 480. While it has been held that the personal attendance of a contestant at a hearing is presumptively essential to the proper presentation of his case, yet it is a matter within the discretion of the register to judge the ability of the party to attend under the circumstances. *Fuller v. Geyer*, 56 L. D. 249. Without some convincing showing of supporting facts that the failure of L. G. Dawson to attend the hearing was unavoidable by reason of the absence of his wife from home, the register had little basis for assuming that it was, particularly as Dawson had expressed the opinion that the

hearing was unnecessary and superfluous. It was not for the defendant to decide as to the necessity for his appearance in order to protect his claims, but having erroneously undertaken to do so he must bear the consequences of his default.

Absence of a defendant due to illness in his family has in some cases been considered by the courts as a sufficient ground for continuance, but not without satisfactory proof of the fact that such illness was the cause of absence, and a showing that the presence of the defendant was necessary to make a proper defense. See *Fisse v. Katzentine*, 93 Ind. 490, *Annotations*, 42 L. R. A. (n. s.) 668. The mere allegation that Mrs. Dawson, a colocator of one claim, was called away from her home due to sickness in the family did not afford a sufficient reason for a continuance on her behalf.

The fact, if true, that Dawson and his wife were employed in work connected with national defense at the date of final hearing constitutes no ground for continuance under the circumstances. There is nothing to show that Dawson intended or was prepared to offer testimony on that date. He gave no notice of such intention nor asked for an order to permit him to present such testimony. When testimony is authorized to be taken elsewhere than at the local office, neither party should be permitted on the day of hearing to submit further testimony without due notice to the other and appropriate order therefor by the local land office. *Dahlquist v. Cotter*, 34 L. D. 396; *McEuen v. Quiroz*, 50 L. D. 167, 171.

No instance is specified in support of the charge that the plaintiff was permitted to ignore the Rules of Practice and none is perceived.

Turning now to the question whether certain of the claims were invalid in whole or part for the reason they were made upon lands not subject to appropriation under the mining laws, it should be observed that:

(1) The early withdrawals for the Oregon and California Military Road under the grant of July 2, 1864 (13 Stat. 355), have no pertinent bearing on the case. The records of the General Land Office show that in so far as these withdrawals affected Sec. 17, T. 27 S., R. 8 E.; Sec. 11, T. 24 S., R. 6 E., which appear to be the only sections included in the claims asserted, the land was either patented or certified to the transferee of the grantee, and title regained by the United States under forest lieu or exchange selection before the claims were located. Thus the land became a part of a national forest, or the grantee lost its rights thereto by reason of the fact that it failed to list them before the grant was fully adjusted and closed after it had been fully satisfied by patent or certification

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(Information Bulletin 1939, No. 5, Transportation-Information Concerning Land Grants).

(2) The defendants deny that there is conflict between the claims and prior established public highways or railroad rights-of-way. As to the grant to the Southern Pacific Railroad Company within the exterior boundaries of claim 14, the locator appears to have excepted the land of the company from its location of that claim. The conflict between the mining claims and rights-of-way for public roads and other railroad rights-of-way is not clearly established, but it is of little importance as the mineral claimant's location under settled rules would be subject to the right-of-way if an easement (*Grand Canyon Ry. Co. v. Cameron*, 35 L. D. 495; *Lindley on Mines* (3d ed.) sec. 530) or if the right-of-way is deemed a fee, it would be excluded from any patent to the claim. *United States v. Bullington*, 51 L. D. 604, 606; *A. Otis Birch, et al.*, 53 I. D. 340.

(3) The contention that there is no possibility of the development of power on claims 14 or 15 or other claims may be dismissed with the observation that the possibility of development of power was not assigned as a ground of invalidity of the claims.

(4) The evidence shows that claims 12, 13 and 17 border on and are within one-quarter mile of Odell Lake and in T. 23 S., R. 6 E. All tracts within one-quarter mile of Odell Lake were withdrawn by Executive order of March 28, 1924, for a reservoir site under authority of the act of June 25, 1910 (36 Stat. 847, 43 U. S. C. sec. 141), as amended by the act of August 24, 1912 (37 Stat. 497, 43 U. S. C. sec. 142), which provides that the lands withdrawn thereunder shall at all times be subject to exploration, discovery, occupation and purchase under the mining laws so far as they apply to metalliferous minerals. The said township was theretofore withdrawn on April 26, 1909, under the first form of the Reclamation Act of June 17, 1902 (32 Stat. 388, sec. 3, 43 U. S. C. sec. 416). These withdrawals continue in force. Withdrawals under the first form of land which in the judgment of the Secretary is required for irrigation works, preclude location under the mining laws on lands within the designated limits of such withdrawals. *James C. Reed, et al.*, 50 L. D. 687; *Instructions*, 32 L. D. 387, 47 L. D. 624; *Loney v. Scott*, 112 Pac. 172. The evidence in the case shows that pumice is a nonmetalliferous mineral. Hence, both of these withdrawals were effective to bar mining locations attempted to be made within their limits by Dawson. It makes no difference whether the lands have been devoted to or are adapted for, the use for which they were withdrawn, or that Dawson may be seeking their restoration for that reason. A mining location to be effectual must be good at the

time it is made and when things are done which the law does not allow to be done, they are as if they had never been done. *Belk v. Meagher*, 104 U. S. 279, 284, 285; *Kendall v. San Juan Mining Co.*, 144 U. S. 658, 663. The claims 12, 13, and 17 are, therefore, absolutely void.

Likewise claims Dawson Nos. 15 and 16 in Sec. 11, T. 24 S., R. 6 E., to the extent of their conflict with the said withdrawal of March 28, 1924, are void for the same reason.

There is nothing in the evidence to show that the defendants made a valid discovery of mineral. The evidence shows that the mineral substance disclosed on the claims is pumicite, which has no market value, except on claim No. 6 where there is a shallow deposit of sand above the pumicite; that the pumicite is a nonmetalliferous superficial deposit which covers a vast area of the surrounding country, having a depth of seven feet or less on these claims, and which because of the enormous quantity existing and its wide distribution, has no commercial value; that while there is an occurrence of lump pumice stone in the locality which is being mined and sold, the pumice on the claims is of the nature of a volcanic ash and has no peculiar properties that render it valuable. In response to specific objections, on the ground of incompetence, to the drawing of conclusions from certain testimony, the character and value of the deposit was shown by the evidence of a mining engineer. His testimony shows *prima facie* that the deposits claimed as a basis for the locations are without prospective or present commercial value; that it is unnecessary to show any special qualifications or learning in mineral subjects to enable witnesses to testify to the type of rock common in the locality and on the claims, and of its lateral and vertical extent; and that the fact that certain pits had been dug on claim No. 1 and pumicite removed therefrom and disposed of, presumably by defendants, did not *prima facie* show that the pumicite was valuable. From the detailed tests of the volume of sand on claim No. 6 made by the Forest Service no inference would be warranted that the claim was valuable for deposits of sand. Factual assertions by defendants appearing in their answers and various communications in contradiction of the evidence, not in the form of testimony, will not be considered.

The testimony shows that notwithstanding the wide extent of the deposit, defendant Dawson located a great number of these claims on land embraced in prior special-use permits, on which the permittees had erected valuable summer homes or commercial establishments in the town of Crescent Lake, and on the shores of Odell Lake and elsewhere, and in some instances where costs of removing

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the overburden or stands of timber would not have justified extraction even if the mineral deposit had some value. He made contracts to sell portions of the ground; interfered with the legitimate use of permittees of the land within their permits; cut timber to make roads and sold some of it for firewood, relying upon an alleged possessory right asserted under the mining law. These acts, without a clear demonstration that the locations were based upon the discovery of valuable deposits of mineral, might well be considered a purpresture and public nuisance. They fully justified the Forest Service in instituting proceedings to test the validity of the claims.

In determining whether land is valuable for mineral it must be shown that the land is more valuable for the purpose of removing and marketing the substance than for any other purpose; that the removal and marketing will probably yield a profit; or that such substance exists in the land in such quantity as to justify a prudent man in expending labor and capital in the effort to obtain it. *Layman et al. v. Ellis*, 52 L. D. 714, 720; *Pacific Coast Marble Co. v. Northern Pacific R. R. Co. et al.*, 25 L. D. 233; Lindley on *Mines*, sec. 98; *United States v. D. L. Underwood* (unreported), decided by the Department on August 11, 1939, and as *Ickes v. Underwood*, by the United States Court of Appeals for the District of Columbia on March 20, 1944. For other cases see 30 U. S. C. A. sec. 21, notes 41, 42. And where mining claims are located on lands in a national forest and embrace desirable recreational areas the showing of mineral values should be clear and unequivocal. *United States v. Langmade and Mistler*, 52 L. D. 700; *United States v. Anna W. Strumquist* (A. 17380), 1933, unreported; *United States v. William S. Nestell et al.* (A. 20513), 1937, unreported. See also *United States v. Lavenson*, 206 Fed. 755; *United States v. Lillibridge*, 4 F. Supp. 204. Irrespective of other grounds of invalidity, it clearly appears that the locations in question are void for lack of a discovery of a valuable mineral deposit.

As to any alleged use and occupation of claim No. 11 as a mill site for mining and milling purposes in connection with the alleged lode claims, it suffices to say that under sec. 2337, Rev. Stat. (30 U. S. C. sec. 42), two classes of mill sites may be located: (1) under the first clause, such as are used and occupied by the proprietor of a vein or lode for mining and milling purposes; and (2) under the second clause, such as have thereon quartz mills or reduction works, the ownership of which is disconnected with the lode or vein. *Eclipse Mill Site*, 22 L. D. 496; Lindley on *Mines* (3d ed.) sec. 520. There is no evidence that there is a quartz mill or reduction works on the claim, and as herein held the defendants have no valid lode

claims to which the mill site could be appurtenant. Under the first clause, there can be no mill site unless there is a lode or vein to which it may attach. *Rico Town-Site*, 1 L. D. 556, 557; *Hecla Consolidated Mining Co.*, 12 L. D. 75, 77. The mill site has, therefore, no validity.

For the reasons above stated, the decision of the Commissioner is

Affirmed.

DISTRIBUTION OF INDIVIDUALIZED TRIBAL FUNDS CREDITED TO THE ESTATES OF DECEASED PUYALLUP INDIAN ENROLLEES UNDER SPECIAL LEGISLATION

Opinion, May 2, 1944

TRIBAL FUNDS—PER CAPITA PAYMENTS—DESCENT AND DISTRIBUTION—WILLS—HEIRS AND DEVISEES—STATUTORY CONSTRUCTION.

The Puyallup tribal fund resulting from the sale of the Tacoma Hospital site was individualized by the act of December 5, 1942 (56 Stat. 1040), which directed that per capita distribution be made to those members of the tribe, or their heirs, whose names appeared on a previously prepared membership roll. In view of the tribal character of the fund no member enjoyed vested rights therein until individualization occurred, and only those persons who meet the requirements of the 1942 act would be entitled to participate in the per capita distribution. Since no enrollee who died prior to enactment of the 1942 act had a vested right in the tribal property which was subject to testamentary disposition at the time of his death, the per capita share credited to the estate of a deceased enrollee may not be paid to the legatees named in his will but must be distributed to his heirs at law as if he had died intestate.

HARPER, Solicitor:

In an informal memorandum dated September 16, 1943, your Office [Office of Indian Affairs] requested an interpretation of section 2 of the act of December 5, 1942,¹ which provides for the distribution of the proceeds of sale of the Puyallup tribal property commonly known as the Tacoma Hospital site.

The specific question presented is whether the funds credited to deceased Puyallup enrollees under the act must be paid to their heirs or whether they may be distributed to the legatees named in their wills. The Superintendent of the Tulalip Agency, in a letter dated September 13, 1943, reported that he is withholding distribution in two cases awaiting instructions. In one other case he has distributed the funds to the legatee named in the will.

¹ 56 Stat. 1040.

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By the act of August 11, 1939,² Congress authorized the Secretary of the Interior to acquire from the Puyallup Tribe of Indians, for Indian sanatorium purposes, the tribal property which is the site of the Tacoma Indian Hospital. Section 2 of the act authorized the appropriation of funds to complete the purchase and provided for the distribution of the proceeds of sale in equal shares to the members of the Tribe as determined by its constitution and bylaws approved May 13, 1936. Opposition of the majority of the tribal membership to distribution of the fund under the method provided by the 1939 act resulted in enactment of the act of December 5, 1942, *supra*, section 2 of which reads:

That when the corrections authorized in Section 1 hereof shall have been made, the sum of \$228,525, authorized to be appropriated by the Act of August 11, 1939 (53 Stat. 1405), for the acquisition of complete title to the Puyallup Indian Tribal School property at Tacoma, Washington, for Indian sanatorium purposes, shall be distributed by the Secretary of the Interior, under such rules and regulations as he may prescribe, to those persons, or their heirs, whose names appear on the said roll approved on May 12, 1930, as herein modified, and section 2 of said Act of August 11, 1939, is hereby amended accordingly.

On February 1, 1943, the Department authorized the Superintendent—

* * * to distribute to members of the Puyallup Tribe of Indians whose names appear on the final roll approved May 12, 1930, and modified by the aforementioned act, share and share alike, the sum of \$228,525, representing proceeds from the sale of the Puyallup Tribal School property at Tacoma, Washington. * * * Payment shall be made to adults direct from the roll, and shares of minors may in your discretion be paid either to parents or guardians, or they may be deposited as individual Indian money. Shares of deceased enrollees shall be credited to heirs, if determined, and if not determined, shall be credited to the estate pending formal determination of heirs. Since the per capita share will be more than \$250, you are not authorized to determine heirs, but should report such cases for hearings by the Examiner of Inheritance.

It is my opinion that under the legislation and departmental authority quoted above the share in the per capita payment due to an enrollee who died prior to enactment of the act of December 5, 1942, *supra*, must be paid to the heirs of such enrollee. It is also my opinion that no such deceased enrollee had a vested right to any part of the proceeds of sale of the hospital property which he could dispose of by will, and no legatee is entitled to share, as legatee of such enrollee, in this per capita payment.

² 53 Stat. 1405-1406.

The right to participate in tribal property is generally recognized as an incident of tribal membership.³ This right, however, is of such nature that it is not descendible,⁴ nor is it transferable by operation of law or voluntary alienation unless made so by act of Congress or applicable tribal law and custom.⁵ As to the nature of tribal property and the rights of individual members therein, it was declared, in the case of *Sizemore v. Brady*⁶ that—

* * * the Creek lands and funds belonged to the tribe as a community, and not to the members severally or as tenants in common. The right of each individual to participate in the enjoyment of such property depended upon tribal membership, and when that was terminated by death or otherwise the right was at an end. It was neither alienable nor descendible.

The foregoing principles apply with full force to the Puyallup tribal property now under consideration. There is abundant evidence that the hospital property belonged to the Puyallup Tribe as a community, and as against such Tribe the individual members enjoyed no vested rights. From the year 1929 until the time of its acquisition the United States leased this property from the Tribe, distributing the annual rental to the members as a per capita payment of tribal funds. The legislation providing for the acquisitions of the hospital site and the distribution of the proceeds of sale treats it as tribal property and offers no basis for the application of a set of rules contrary to those cited above for determining the property rights of members. The situation here presented is to be distinguished from that obtaining in the case decided by the Solicitor on November 22, 1921,⁷ involving the devise of an "expectancy" which consisted of the right to share in the final division of the remaining unallotted lands of the Crow Reservation. In that case it was held that under the special legislation providing for the allotment of the remaining reservation lands the right to receive an allotment was a descendible one subject to the testamentary disposition of the Indian. The opinion says, in part:

* * * In other words, the right so to share is a descendible one which, in case of death intestate, inures to the benefit of the heirs. * * * If the expectancy consists of a mere "float" which ceases at death, then there is nothing for a testator to convey by will. If the right, however, is a descendible

³ Cohen, *Handbook of Federal Indian Law*, Ch. 9, sec. 3; *LaRoque v. United States*, 239 U. S. 62.

⁴ *Sizemore v. Brady*, 235 U. S. 441; *Gritts v. Fisher*, 224 U. S. 640; *Woodbury v. United States*, 170 Fed. 302; *Sloan v. United States*, 118 Fed. 283, *app. dismiss.* 193 U. S. 614.

⁵ E.g., acts of June 28, 1906 (34 Stat. 539), and April 18, 1912 (37 Stat. 86), relating to pro rata shares in the Osage mineral estate. See also Op. of Solicitor, November 22, 1921 (48 L. D. 479).

⁶ 235 U. S. 441.

⁷ 48 L. D. 479.

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one which in case of intestacy inures to the benefit of his heirs, the rule is now otherwise. * * * Big Lark, being entitled to an additional allotment on the Crow Reservation, and those lands, in effect, being held in trust by the United States for her benefit, I am of the opinion that * * * she had the power to dispose of such additional allotment by will.

This opinion recognizes clearly the principle that a member of an Indian tribe has no vested, enforceable right, as against the tribe, to any common property of the tribe in the absence of legislative act or applicable Indian law or custom creating such a right.

In the individualization of tribal property and creation of vested property rights in the members, Congress exercises a plenary power conferred upon it by the Constitution of the United States. This authority, subject to certain limitations not pertinent here,⁸ includes not only the power to prescribe the time and mode of distribution but also the power to designate the ultimate recipients of the property.⁹ In the case of tribal funds, individualization usually occurs when payment is made or when the share of the individual is credited to him,¹⁰ but in any given case reference must be had to the Congressional act itself to ascertain the plan of distribution.

In the instance at hand Congress directed that payment be made to those Puyallup Indians whose names appear on the approved roll of 1930, or *their heirs*. The word "heirs" has been given various definitions, depending on the circumstances surrounding its use. In a broad or loose sense it may refer to the persons succeeding to the property of a decedent, either by inheritance or by purchase under a will. The most common examples of loose construction are found in the interpretation of wills and deeds where the courts often give the word "heirs" its broader meaning in order to effect the intention of the testator or grantor as to the disposition of vested property.¹¹ In these examples of loose construction there is an implicit recognition of the right of a person to make a lawful disposition of his own property. The word "heirs" also has a technical meaning, however, in which it refers to those persons on whom the laws of succession cast the property of an intestate.¹² It is in the field of statutory construction that the word is usually given its more technical meaning, with the result that beneficiaries under a will are not included within the term un-

⁸ Cohen, *Handbook of Federal Indian Law*, Ch. 5, sec. 5A, discussing *Chippewa Indians v. United States*, 301 U. S. 358, aff'g 80 Ct. Cl. 410.

⁹ Cohen, *Handbook of Federal Indian Law*, Ch. 9, sec. 6, and cases cited.

¹⁰ Op. Sol., I. D., M. 8370, August 15, 1922; 33 Op. Atty. Gen. 60, November 4, 1921.

¹¹ See *In re Beck's Estate*, 225 Pa. 578, 74 Atl. 607; *Words and Phrases*, vol. 19, p. 297.

¹² See *Words and Phrases*, vol. 19, p. 200 *et seq.*; and *Hays v. Wyatt*, 19 Idaho 544, 115 Pac. 13, 34 L. R. A. (n.s.) 397.

less the context of the statute clearly shows an intention to include them.¹³

It is my opinion that the nature and purpose of the act of December 5, 1942, *supra*, indicate that the word "heirs" should be strictly construed so as to exclude the legatees of deceased enrollees. By individualizing the tribal property the statute created vested rights where none existed before. It is therefore prospective in nature and negatives the idea that the individual enrollees enjoyed vested property rights prior to the date of its enactment. If it had been intended that the date of attachment of individual rights be retroactive in order to bring the share of a deceased enrollee within the scope of his will it is reasonable to believe that some language appropriate to that end would have been used.¹⁴ Without allowing the Secretary any latitude in fixing the class of ultimate recipients, and without the use of qualifying language the statute directs the Secretary to pay the share of a deceased enrollee to his heirs. This is a mandatory direction to pay to a class.¹⁵ For the reasons stated, I feel that a legatee of a deceased enrollee cannot be considered an "heir" within the meaning of the term as used in this act.

There are other persuasive reasons aside from those already mentioned for excluding legatees of deceased enrollees from sharing in the Puyallup per capita payment. Due to the very nature of a will or testament it is well settled that a testator cannot make testamentary disposition of property rights or interests unless they belong to him or he has a legal power of disposition at the time of his death.¹⁶ Standing as a corollary to that principle is the rule that a beneficiary under a will is a gratuitous taker and acquires no greater right, as against third persons, than his testator had.¹⁷ Applying those prin-

¹³ E.g., acts of May 27, 1908 (35 Stat. 312), and January 27, 1933 (47 Stat. 777), which require court approval of the conveyances of full-blood heirs, construed as inapplicable to devisees in *McKinney v. Bluford*, 197 Pac. 430; *Burgess v. Nail*, 103 F. (2d) 37, 42; *Grisso v. United States*, 138 F. (2d) 996; *Murray v. Ned*, 135 F. (2d) 407, cert. denied November 8, 1943, '88 L. ed. Adv. 49. For other examples of strict construction of the word "heirs" see *Higginbotham v. Higginbotham*, 177 Ky. 271, 197 S. W. 627, L. R. A. 1918A 1105; and *Newton v. Newton*, 77 Tex. 508, 14 S. W. 157.

¹⁴ For a parallel see *Hall, et al. v. Russell, et al.*, 101 U. S. 503, 25 L. ed. 829, holding that a devisee is not an "heir" as used in the statute which authorized issuance of a patent to the heirs of a homesteader who died before acquiring vested rights. See also 16 Am. Jur., secs. 158 *et seq.*

¹⁵ Crawford, *Statutory Construction*, secs. 264 *et seq.*, stating that a statute which creates a new right, privilege or immunity, and regulates the manner of its exercise, should be strictly construed and treated as mandatory; and citing *Wheaton v. Peters*, 8 Pet. (U. S.) 591.

¹⁶ See Page on *Wills*, vol. 1, sec. 197, citing *White v. Chellew*, 108 Wash. 526, 185 Pac. 619; *Stewart v. Todd*, 190 Ia. 283, 20 A. L. R. 1272; 173 N. W. 619, 180 N. W. 146; *Snyder v. Snider*, 202 Ky. 321, 259 S. W. 700; *McLaughlin v. McGee*, 131 Md. 156, 101 Atl. 682; *Clark v. Clark*, 319 Mo. 591, 4 S. W. (2d) 807; *In re Curtis' Estate*, 109 Vt. 44, 192 Atl. 13.

¹⁷ Page on *Wills*, vol. 1, sec. 197.

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ciples to the present case it is evident that a legatee of a deceased enrollee takes nothing. His testator had no property right subject to testamentary disposition. The will is the only source of title the legatee has and the property in question is outside the scope of that instrument. In this connection, the legatee is in a position somewhat similar to that of a legatee seeking to recover under a State statute for the wrongful death of his testator. In each case the property right is a creature of statute, collectible only in accordance with the terms of the statute, and not subject to testamentary disposition by the decedent unless expressly made so by the statute.¹⁸ As I have indicated above, a legatee of a deceased Puyallup enrollee does not meet the requirements of the act of December 5, 1942, *supra*.

In authorizing the per capita payment the Secretary prescribed that where the heirs of a deceased enrollee had already been determined by the Department such determination should be adopted for use in distributing the share of the enrollee. As to those enrollees whose heirs had not been previously determined by the Department it was prescribed that their shares should be placed to the credit of their estates to await action by the Examiner of Inheritance. The fact that the enrollee died prior to individualization of the tribal property and left no title inuring to his heirs at the date of his death offers no obstacle to the authority of Congress to direct its distribution to his heirs.¹⁹

In his letter of September 13, 1943, the Superintendent of the Tulalip Agency reported that he had already distributed the share of Silas Cross, a deceased Puyallup enrollee, who died testate on June 25, 1936, to the executrix named in his will. This will was approved by the Department on March 26, 1938 (Indian Office file 7310-38). The letter from your Office transmitting the will for consideration recommended that the instrument be approved and that authority be granted for payment to the executrix of funds then held to the credit of the estate and "such other Tribal payments as may accrue to said estate." It is believed that the action taken by the Department in that case was without authority insofar as it might be construed to predetermine the disposition of nonexistent property, and it is suggested that recommendations be submitted for clarification of the decision. As to the distribution already made of the share of Silas Cross in the per capita payment authorized on February 1, 1943, it appears that such distribution was not in accord with the views I

¹⁸ *In re Lister's Estate*, 22 Ariz. 185, 195 Pac. 1113; *Sturges v. Sturges*, 126 Ky. 80, 12 L. R. A. (n.s.) 1014, 102 S. W. 884.

¹⁹ *Shutthis v. McDougal*, 170 Fed. 529, *app. dismissed*, 225 U. S. 561.

have expressed above. The record shows that Silas Cross was survived by his wife, whom he named as sole beneficiary in his will, and seven children. It may be that the funds paid to the widow were used for the benefit of herself and the children but there is no information before me at the present time on this phase of the matter.

I am returning the case of Louise Douette, a deceased Puyallup enrollee, for action in accordance with the conclusions reached in this memorandum.

FINE SHEEP COMPANY

Decided May 10, 1944

PUBLIC LANDS—GRAZING—BASE PROPERTY—PARALLEL LANDS.

The term "parallel lands," as applied to certain privately controlled lands in grazing districts, must be considered as embracing those lands that are generally of the same character and type as the surrounding Federal range, that is, they are uncultivated and produce the same general types of forage and are physically similar to the surrounding Federal range. In those districts where it has been determined that the Federal range can be used only during a part or certain parts of the year, such lands are not dependent by use.

PUBLIC LANDS—GRAZING—BASE PROPERTY—YEAR-ROUND OPERATION.

The express requirement in section 1, paragraph (a) of the Federal Range Code of 1942 that there be "possession of sufficient land or water to insure a year-round operation * * *" is clearly complemented by the definition of "land dependent by use," which is defined in section 2, paragraph (g) of the Code, in part as "forage land which is of such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it."

PUBLIC LANDS—GRAZING—BASE PROPERTY—LAND OR WATER BASE.

The discretion to be exercised by the Grazing Service in the determination of whether land or water shall constitute base property in a given district is one which will be disturbed only upon a showing that it was arrived at capriciously, arbitrarily, or without adequate knowledge of the existing conditions.

PUBLIC LANDS—GRAZING—CARRYING CAPACITY.

The carrying capacity of lands can be determined only by an examination of the lands, and the Department necessarily will accept the findings of the Grazing Service in cases where unfairness or discrimination is not charged, and no effort is made by the appellants to state in what instances the determinations are incorrect or what, in their estimation, such determinations should have been.

PUBLIC LANDS—GRAZING—PERMITS FOR CONSTRUCTION OF IMPROVEMENTS.

The issuance of a permit for the construction of improvements on Federal range under section 4 of the Taylor Grazing Act does not in itself con-

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stitute the grant of a right to use the Federal range that is within the fence constructed under such permit.

PUBLIC LANDS—GRAZING—HEARINGS ON APPEAL—PROCEDURE.

The requirement of section 9(1) of the Code that a copy of an appeal and brief in support thereof must be served on each party of record, applies only to parties who are adversaries such as appellants and interveners, and neither requires the service of appeals on the advisory board, or the district or regional graziers, nor contemplates the filing of a reply brief by the latter.

CHAPMAN, *Assistant Secretary*:

The Fine Sheep Company has appealed from a decision of an examiner of the Grazing Service which modified the decision of the district grazer on its application for a 1943 grazing license in Oregon Grazing District No. 6 (Baker).

On December 14, 1942, the company, through its President, John Stringer, filed an application for a license to graze 400 head of cattle from April 1 to May 31, 1943, upon an individual allotment which has been fenced by the company under a permit issued pursuant to section 4 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269, 43 U. S. C. sec. 315c), and to graze 200 head of cattle in common with other licensees upon Federal range located "south of Durbin Creek." It appears that the fenced allotment includes a considerable area of privately owned lands that are owned or controlled by the appellant or its President, Stringer, and approximately 591 acres of Federal range. The appellant or its president also owns or controls other lands totaling 686.56 acres that are outside of the fenced allotment, and in the notice sent to the appellant regarding the action taken on its application, it was stated, in substance, that a license to graze on Federal range, as requested in the application, would not be granted but that the 591 acres of Federal range within the fenced allotment would be exchanged for the use of the 686.56 acres of range land, which, the record shows, is unfenced and therefore cannot be conveniently closed to the livestock of other licensees so as to be subject to use only by the appellant's livestock. Subject to the appellant's agreement to this exchange of use, the district grazer ruled that a license would be granted for the grazing of 400 head of cattle on the fenced allotment during April and May 1943. In addition, the district grazer has offered an exchange-of-use license for 59 head of cattle to be grazed during April and May 1943, such license being offered in exchange for the grazing rights on the "Hickson tract," owned by the appellant but not suitable for use by it for the reason that it lies within an allotment granted to one Kivett or her lessee. Also, the district grazer has offered the appellant what has been

termed a "war emergency" license to graze 41 head of cattle during the same two months. The appellant thus was offered a license for 500 head of cattle, 400 to be grazed on the fenced allotment, and the remaining 100 to be grazed on Federal range "south of Durbin Creek."

The appellant appealed from the district grazier's decision, and the case was heard at Vale, Oregon, on February 25, 1943, before an examiner of the Grazing Service. On March 22, 1943, the examiner rendered his decision, modifying the decision of the district grazier by ruling that the exchange-of-use license for 59 head of cattle and the "war emergency" license for 41 head of cattle should stand, but that the license to graze on the fenced allotment should be increased to 500 head. In this connection, the examiner's decision reads in part as follows:

The carrying capacity rating of all lands within the fenced pasture of the appellant, north of Durbin creek and west of Burnt river has been estimated by the range examiner to be 1026 animal-unit months, or sufficient forage for the grazing of 513 cattle during the months of April and May. The appellant has stated no reason why he should not graze 500 or 513 head of cattle within this fenced pasture during the months of April and May 1943, rather than the 400 head of cattle referred to in the application filed December 14, 1942. The carrying capacity of the Federal range within the fenced pasture is 138 animal-unit months, according to the range examiner's report, and this amount of forage upon the Federal range is available to the appellant irrespective of the numbers of cattle grazed within this enclosure. It appears, therefore, that a license or licenses to the appellant for April and May 1943 on the basis of 500 head of cattle within the private allotment and 100 head of cattle outside the fenced pasture, fully provides for the numbers of livestock and period of time requested in the application, and the appellant is not justified in his request, made at the time of the hearing, to graze 150 cattle south of Durbin creek.

It is from these rulings that the present appeal has been taken. The following are substantially the assignments of error:

- (1) That the examiner erred in not directing the award of a license based on the appellant's privately owned or controlled lands in Baker County, Oregon, and elsewhere.
- (2) That the appellant's watering facilities should be considered as base property.
- (3) That the determination of the carrying capacity of the range which the appellant seeks to use was arbitrary and made without reference to the amount of livestock that could be grazed without damage to the forage.
- (4) This assignment is not altogether clear but, as interpreted by the Department, the appellant appears to be questioning the propriety of considering the 591 acres of Federal range within the fenced allotment as being subject to use by the appellant in exchange for the use of the appellant's lands outside the enclosure. Apparently the appellant contends that, upon receiving a section 4 permit to fence the enclosure, it became vested with a right to use the Federal range within the enclosure, regardless of whether or not it owned or controlled base property for the support of a license.

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In order to treat fully the first assignment of error, it is necessary to set out certain facts concerning the action taken generally on the appellant's and other applications in the district. According to the testimony of the district grazier (Tr. 4) only lands that are "improved, cultivated, cropped lands supporting the growth of hay and grain, [and] irrigated pastures or native range lands which are used by the licensees or permittees at a period of the year when not using the Federal range" are considered as base properties for licenses within the district, which is taken to mean that lands which are similar in character to the Federal range are not acceptable as base property. The lands of the appellant are of the latter type, i.e., range lands which, although producing forage for livestock, do not differ substantially from the surrounding Federal range, and thus are subject to use at the same time as the Federal range. In other words, the appellant's lands are what have come to be referred to in the parlance of the Grazing Service as "parallel lands."

While the term "parallel lands" has acquired extended usage the necessity for its definition has not heretofore been presented to the Department. The district grazier stated at the hearing (Tr. 4) that "purely range land, which is used only at the time of year when Federal range is used, is not classified as base property but is considered as parallel use land." This statement, while indicative of the type of land involved, is not sufficiently comprehensive to afford guidance as a general definition. It is true that "parallel" lands are of the same type as the surrounding Federal range, and that they thus are "range lands" in character. However, the fact that the lands actually are used only at the same time as the Federal range is not controlling, since it is conceivable that any land which produces forage *can* be used at the same time as the surrounding Federal range, although in practice it may not be customary to do so.

Neither is the fact that, during the priority period, the lands were used at the same time as the Federal range entirely determinative of the question whether such lands are "parallel." The district grazier indicated in his testimony (Tr. 7) that, in some instances wherein lands of the same type as the surrounding Federal range *have been* used during the part or parts of the year when livestock are not permitted on the Federal range (that is, the "off" period), they could be considered as base property. This factor cannot be accepted as a controlling standard, since there may be instances wherein cultivated lands of a type which, other things being equal, would be considered as base property, have been used to some extent at the same time as the surrounding Federal range.

In the opinion of the Department, the term "parallel lands" must be considered as embracing those lands that are generally of the same character and type as the surrounding Federal range. That is, they are uncultivated and produce the same general types of forage and are physically similar to the surrounding Federal range. This is the only connotation of the term that will permit its application in all circumstances. There is no doubt that the appellant's lands are "parallel lands" within this meaning, since they are shown to be identical with, or similar to, the surrounding Federal range. They are untilled and uncultivated, and produce only native forage which is the same as that on the Federal range. It is true that the record indicates that the forage is somewhat heavier on the appellant's lands, but that is a condition which may be attributed to the more limited use made of the appellant's lands, and not necessarily to an inherent difference.

In his decision, the examiner upheld the refusal of the district grazier to recognize the lands involved as base property, and after careful consideration of the question the Department is of the opinion that the examiner was correct. Section 1, paragraph (a), of the Federal Range Code of 1942 (7 F. R. 7685), provides in part as follows:

To promote the highest use of the public lands within grazing districts which have been or hereafter are established, possession of sufficient land or water to insure a year-round operation for a certain number of livestock in connection with the use of the public domain will be required of all users.

In those districts wherein it has been determined that the Federal range can be used only during a part or certain parts of the year there is a presumption that any use during other parts of the year is improper, either for the reason that it may result in damage to the range, or because such use would be impossible by reason of snow or other physical factors. Therefore, if a license were to be issued on the basis of ownership of parallel land, it would mean that the licensed livestock would have no feed during the "off" season. Thus there would not be "possession of sufficient land * * * to insure a year-round operation." In addition, if the impropriety of using the parallel land during the "off" season were to be ignored, and a license were to be issued with knowledge of the fact that it would result in such use, the purpose of the Code, also expressed in section 1, paragraph (a), of promoting "the proper use of the privately controlled lands * * * dependent upon [the] public grazing lands" would be defeated. Furthermore, the express requirement, in section 1, paragraph (a), that there be "possession of sufficient land or water to insure a year-round operation * * *" is clearly

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complemented by the definition of "land dependent by use," which is defined in section 2, paragraph (g) of the Code in part as "forage land which is of such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it * * *."

In the first assignment of error, the appellant complains also of the refusal of the examiner to direct the award of a license based on the appellant's privately owned or controlled lands in Baker County, Oregon, "and elsewhere." As for the lands situated "elsewhere" little can be said here for the reason that such lands apparently have not been offered as base property in the Baker District, and they therefore do not require consideration.

The appellant's contention that waters should be considered as base property in the district involves a question which already has been decided by the Department in several cases. In *Fremont Sheep Company* (A. 23170), decided January 20, 1942 (unreported), wherein this question was fully discussed, the Department held that the discretion to be exercised by the Grazing Service in the determination of whether land or water shall constitute base property in a given district is one which will be disturbed only upon a showing that it was arrived at capriciously, arbitrarily, or without adequate knowledge of the existing conditions. In the present case there is nothing to indicate that the waters or the lands of the appellant are of such significance as would require their consideration as base property. The area is one in which the Federal range can be used properly only during a part of the year, thus requiring privately owned or controlled feeding facilities during the remainder of the year for the support of licensed livestock. The area is subject to heavy snowfall which at times makes the range unusable, regardless of water conditions. Land, rather than water, therefore is the significant factor in a livestock operation using the Federal range in this area. In these circumstances there is nothing capricious or arbitrary in the refusal of the Grazing Service to treat water as base property in the district, or anything to indicate that such refusal stems from a lack of knowledge of existing conditions. Accordingly, the decision of the examiner on this point is affirmed.

The question of the correctness of the carrying capacity ratings of the range has been adequately treated by the examiner. It is understood that the appellant challenges only the ratings given the Federal range adjacent to the fenced allotment and "south of Durbin Creek." In the case of *Spicer Brothers* (A. 21923), decided March 8, 1939 (unreported), it was stated that, as the carrying capacities of lands can be determined only by an examination of the lands,

the Department necessarily will accept the findings of the Grazing Service in cases wherein unfairness or discrimination is not charged, and no effort is made by the appellants to state in what instances the determinations are incorrect, or what, in their estimation, such determinations should have been.

The appellant's complaint arises from its failure to have obtained a license to graze 200 head of cattle on the Federal range adjacent to the fenced allotment. As stated above, it has been licensed to graze 100 head of cattle on that range, 41 of which are to be grazed under a "war emergency" license, and the remaining 59 to be grazed under an exchange-of-use license. The first of these licenses appears to have been issued by the Grazing Service solely to aid in increasing livestock production for war purposes, and since it does not constitute a license received as a matter of privilege prescribed by the provisions of the Federal Range Code, the appellant cannot complain of its extent. Neither should the second portion of this license be so regarded, since it has been issued by the Grazing Service only in an effort to allow the appellant to receive some benefit from its unprotected private lands. Accordingly, as neither of the licenses referred to has been issued as a matter of right, the carrying capacity of the range is of no consequence, for even though it were greater than has been calculated, it would not necessarily benefit the appellant.

However, even assuming that the appellant had suffered a reduction in a regular grazing license because of the determination of the carrying capacity of the range in question, there has been no showing that would cast any serious doubt on the adequacy of the ratings as given. The appellant depends upon a statement by the district grazer that the range would temporarily carry more livestock, and the fact that the range has on several occasions caught fire and burned, as support for increasing the rating of the carrying capacity of the range and an increase in its licenses. Neither fact is sufficient to justify such increase. The district grazer did not categorically state that the range would carry more livestock, but qualified his statement by the observation that such increased use would be only temporary and would probably result in detriment to the range by preventing new perennial plants from becoming established. In other words, the district grazer, while recognizing that the range could be used for a limited time by a greater number of livestock, felt that such use would prevent the improvement of the range. This in itself is sufficient to justify the refusal to permit more livestock to use the range. As for the fires on the range, it is by no means certain that they have resulted from an excess of forage growth,

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or that such fires could have been prevented by closer cropping by grazing livestock. As there has been no showing sufficient to indicate that the rating given the range in question is erroneous, and in view of the fact that the licenses given the appellant to use this range were not granted in such circumstances as would entitle the appellant to complain of their extent or duration, the appeal is to this extent denied.

The contention of the appellant that a right to graze on the 591 acres of Federal range within its fenced allotment was given the appellant as an incident to the section 4 permit, and that it should therefore not be considered in the determination of the exchange-of-use license, is without merit. The issuance of a section 4 permit does not in itself constitute the grant of a right to use the Federal range that is within the fence constructed under such permit. The appellant contends that such right was granted in exchange for its promise to construct the fence. There is nothing in the record that supports this contention and such an agreement in any event would be of doubtful validity in the absence of some provision of law or regulation for the granting of grazing privileges in exchange for benefit or services. Also, it would appear that the construction of the fence was for the benefit of the appellant and not the Government, and thus it would be difficult to see why any assurance of this type should have been given in order to insure the building of the fence. Licenses or permits to use the Federal range are granted only upon the offer of base property having the attributes necessary to support such licenses or permits, or upon an exchange-of-use basis. Federal range as such cannot be base property, and up to the present the appellant has had no property which was recognized as base. Accordingly the appellant's use of the Federal range within the fenced allotment represented a gratuity on the part of the Grazing Service. If, then, the Grazing Service now requires the use of other lands which are owned or controlled by the appellant in exchange for the use of the Federal range in question, the appellant cannot complain. Accordingly, the appeal in this respect also is without merit, and is denied.

The examiner ruled that, as the carrying capacity of the lands within the fenced allotment is sufficient to permit the grazing of 513 head of cattle during the months of April and May, a license for 500 head of cattle should be granted in place of the license for only 400 head. This ruling also is affirmed.

Before concluding it appears advisable to make some mention of a procedural question which is presented by this case. At the hearing, no interveners appeared, and thus only the Fine Sheep Company

is a party to the case. In these cases the Grazing Service is not an adversary party but merely stands in the position of a fact-finding agency which is interested only in determining whether or not it has reached a proper decision on an appellant's case. It is noted that the attorneys for the appellant have filed an affidavit with the appeal wherein it is stated that a copy of the appeal was served upon the regional grazer for Oregon and upon the chairman of the advisory board of the Baker Grazing District. Such service was unnecessary. Section 9(1) of the Federal Range Code provides that a copy of an appeal and any brief in support thereof must be served on each party of record, and that any such party opposing the appeal will be allowed twenty days within which to file a reply brief if he so desires. This requirement applies only to parties who are adversaries such as appellants and interveners, and neither requires the service of appeals on the Grazing Service or officials thereof, nor contemplates the filing of a reply brief by the latter.

In accordance with the above rulings, the decision of the examiner is affirmed and the appeal is dismissed.

Dismissed.

ERIE RAILROAD CO. v. TOMPKINS, 304 U. S. 64 (1938)—EFFECT ON RULES FOR MEASURE OF DAMAGES IN TRESPASS ON UNITED STATES PROPERTY IN THE ABSENCE OF FEDERAL LEGISLATION

Opinion, May 11, 1944

GENERAL LAND OFFICE PRACTICE—INSTRUCTIONS TO TRESPASS AGENTS—MASON v. UNITED STATES—STATE STATUTORY LAW—SWIFT v. TYSON—RULES OF DECISION ACT—FEDERAL COMMON LAW.

In the absence of Federal legislation fixing the measure of damages for trespass and conversion affecting United States property, the General Land Office instructs its trespass agents that under *Mason v. United States*, 280 U. S. 545 (January 1923), State law, meaning statutory law, relating to trespass damages is binding on Federal courts. It also instructs them that in the absence of State statutes the rules of Federal common law govern, namely, the interpretations of the common law made by the Federal courts, thus implicitly recognizing the doctrine of *Swift v. Tyson*, 16 Pet. 1 (1842). Question therefore arises whether the decision in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938), requires these instructions to be changed so as to state that in the absence of Federal legislation only State law governs, written or unwritten.

THE DOCTRINE OF SWIFT v. TYSON STATED AND OVERRULED BY ERIE RAILROAD CO. v. TOMPKINS—RULES OF DECISION ACT REINTERPRETED.

The *Erie* case describes the doctrine of *Swift v. Tyson* as holding that under the Rules of Decision Act, 28 U. S. C. sec. 725, Federal courts exercising

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jurisdiction on the ground of diversity of citizenship in trials at common law need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court but are free to exercise an independent judgment as to what the common law of the State is. The opinion then declares that this holding misconstrued the Rules of Decision Act and that except in matters governed by the Federal Constitution or by acts of Congress the rules of decision are those of State law, written or unwritten, and that there is no Federal general common law.

SCOPE OF THE ERIE DOCTRINE UNCERTAIN—NOT YET APPLIED IN THE SUBJECT MATTER JURISDICTION—TREND TOWARD EXTENSION OF THE FEDERAL FIELD IN THE ABSENCE OF FEDERAL LEGISLATION.

Limitation of the Erie doctrine to diversity cases is suggested by the peculiar relation of all its factors to the diversity jurisdiction; by its nonextension thus far to cases in the subject-matter jurisdiction; by observations in subsequent opinions; and by decisions in which questions affecting the United States as a party have been decided as Federal although they have not been expressly answered by Federal Constitution, treaties or statutes.

THE ERIE DOCTRINE AND FEDERAL COMMON LAW.

The Erie declaration by Mr. Justice Brandeis "There is no federal general common law" has been termed too broad. Since its pronouncement both qualified writers and Federal judges, among them Mr. Justice Brandeis himself, have recognized a Federal common law, a body of decisional law developed by the Federal courts, untrammelled by State court decisions. Mr. Justice Jackson, concurring in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U. S. 447, interprets the Erie declaration and finds that Federal common law does exist.

THE DEPARTMENT OF JUSTICE AND TRESPASS—ITS ARGUMENT THAT MEASURE OF DAMAGES IS A MATTER OF FEDERAL LAW DESPITE ABSENCE OF FEDERAL LEGISLATION.

In its petition for certiorari in *Standard Oil Co. of California v. United States*, 309 U. S. 654 (1940), the Department of Justice, relying on *Board of Commissioners v. United States*, 308 U. S. 343, 350, argued that Federal law controls when the right to be enforced springs from the holding of property by the Government in a sovereign capacity under the Constitution and that the measure of damages in a conversion of United States oil is not to be determined by State law, under *Mason v. United States* and *Erie v. Tompkins* but is primarily a matter of Federal law as to which a Federal court may formulate a judicial rule in the absence of express Federal legislation.

The Supreme Court not having stated its grounds for denial of certiorari in this case, the Government's argument is not foreclosed. Further, it appears reinforced by subsequent decisions expanding the definition of Federal questions. For the Congress has occupied the field of public lands under the Constitution and, in statutes of various types, has recognized a duty to protect the public property in its care and to enforce the public's rights against trespass, whether civil or criminal. The whole question of trespass and enforcement of Federal rights against it may therefore be considered primarily a matter deriving from Federal sources, both policy

and law, even in the absence of an express statute, and as such a Federal question would be subject to Federal decisional law rather than to the rules of the State, whether written or unwritten.

REQUIREMENTS IF MEASURE OF TRESPASS DAMAGES PROVE TO BE A FEDERAL QUESTION.

Decision that measure of damages for trespass on Federal property is a Federal question would make both the *Mason* and the *Erie* case inapplicable to trespass cases and would require the instructions to state that in the absence of express Federal legislation only Federal decisional rules of damage control.

THE SEVERAL CONSIDERATIONS ADVANCED ARE PERSUASIVE OF *ERIE'S* INAPPLICABILITY HERE BUT ARE NOT AT PRESENT COMPULSIVE OF REVISION OF THE INSTRUCTIONS.

The foregoing considerations are persuasive both that the *Erie* decision is inapplicable here and that trespass on Federal property is a Federal question controlled by Federal decisional law under the exception to the Rules of Decision Act. At present however there is no compelling legal reason for revision of the instructions to accord with these assumptions.

HARPER, *Solicitor*:

Your [Commissioner of the General Land Office] memorandum of November 13, 1943, transmits for the Secretary's approval a draft of a proposed amendment of the regulations concerning the measure of damages in cases of trespass and conversion affecting Government lands.¹ The object of the change, you state, is to make the regulations conform with existing law as interpreted by the Supreme Court in *Erie Railroad Co. v. Tompkins*, 304 U. S. 64 (1938).

You refer briefly to your office practice as applying the "general" rules of the common law, in the sense of "Federal" common law, in the absence of a State statute fixing the measure of damages for trespass. The *Erie* decision, you say, necessitates a modification of this rule and requires that the law to be applied in the absence of a State statute is not Federal common law but, instead, the common law as interpreted and applied by the courts of the State. In support of your conclusion you quote the following passage from the *Erie* decision (p. 78):

Third. 1. Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State. 2. And whether the law of the State shall be declared by its Legislature in a statute or by its highest court in a decision is not a matter of federal concern. 3. There is no federal general common law. 4. Congress has no power to declare substantive rules of common law applicable in a State whether they be local in their nature or "general," be they commercial law or a part of

¹ 43 CFR 288.1-288.5, Circ. 881, March 14, 1923, 49 L. D. 484; 43 CFR 288.6, Circ. 1309, August 17, 1933, 54 I. D. 226; Circ. 1366, September 4, 1935, 55 I. D. 347.

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the law of torts. 5. And no clause in the Constitution purports to confer such a power upon the federal courts. * * *

Despite the sweeping character of this paragraph, study of the *Erie* opinion as a whole and of the course of decisions in the Federal courts in the six years since the decision was rendered suggests that the paragraph may not be so all-comprehending as at first blush it seems and that it may not require the change which you propose for the trespass regulations.

First. The *Erie* opinion must be viewed and weighed with particular reference to the peculiarities of the diversity jurisdiction in which it is set. The Federal jurisdiction in the case is in no way a subject-matter jurisdiction but is exclusively one of parties, arising solely from the adventitious fact of diverse citizenship. The doctrine concerning rules of decision which *Erie* discusses and disapproves was laid down in the diversity case of *Swift v. Tyson*^{2a} and concerned the rules of decision to be applied by Federal courts in diversity cases. The Rules of Decision Act, or section 34 of the Judiciary Act of 1789, which the doctrine of *Swift v. Tyson* is now said by *Erie* to have misconstrued, was intended to prescribe the rules of decision to be applied by Federal courts in the exercise of their diversity jurisdiction. It was enacted with the view, according to its legislative history, of overcoming the fears of opponents of the Federal Constitution and of the diversity jurisdiction that the new national courts would not apply State law in diversity cases but would make their own rules for deciding them. The cases in which the erroneous doctrine has been applied through the 96 years since 1842 have been diversity cases. The course of the court which *Erie* disapproves and abandons is that which it pursued in diversity cases.

These features of the opinion make clear that the excerpt quoted, although it does not mention the diversity jurisdiction and although its declarations seem categorical and of general application, is not to be isolated from its context but is to be considered as especially related to diversity cases. Not only this. The features described even suggest that the *Erie* doctrine may perhaps have been intended to be applied in diversity cases only.

Second. There has been no decision by the Supreme Court directed expressly to this possibility. Nevertheless, it may not be without significance that in the years since the *Erie* decision the Supreme Court has applied the *Erie* doctrine in diversity cases only and not

² For convenience in reference the sentences here have been numbered.

^{2a} 16 Pet. 1 (1842).

once has invoked it in those cases under its nondiversity jurisdiction to which the United States has been a party.

Of considerable interest in this connection and perhaps of importance as straws in the wind are the observations of various members of the Federal bench. Most striking among these are the following: Mr. Justice Stone, in *West v. American Telephone and Telegraph Co.*,³ a diversity case, said:

But the obvious purpose of section 34 of the Judiciary Act is to avoid the maintenance within a state of two divergent or conflicting systems of law, one to be applied in the state courts, the other to be availed of in the federal courts, *only in case of diversity of citizenship*. [Italics supplied.]

In 1942, Mr. Justice Jackson wrote a concurring opinion in *D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation*, a nondiversity case.⁴ In this, after referring to the *Erie* case and to *Klaxon Co. v. Stentor Electric Mfg. Co.*,⁵ a diversity case which had applied the *Erie* doctrine, he said:

These recent cases, like *Swift v. Tyson* which evoked them, dealt only with the very special problems arising in diversity cases, where federal jurisdiction exists to provide nonresident parties an optional forum of assured impartiality. *The Court has not extended the doctrine of Erie R. Co. v. Tompkins beyond diversity cases*. [Italics supplied.]

In a footnote he said: "Its effect *even in such cases* seems not to have been definitely settled," and he quoted from two cases⁶ in which the Court seems, superficially at least, to have taken conflicting positions on the applicability of the *Erie* doctrine to suits in equity.

In *United States v. Clearfield Trust Co., et al.*,⁷ a nondiversity case, Circuit Court Judge Goodrich declined to apply the *Erie* rule and was sustained by the Supreme Court, *infra*, although this case like the nondiversity cases⁸ on which he relied posed a particular question not expressly answered by the Constitution, treaties or statutes of the United States.

In summarizing the cases relied on, among them the *D'Oench* case, Judge Goodrich said of that decision at pages 94, 95:

* * * the majority of the Court held it a federal question whether one who had given a note to a bank as part of a plan to conceal its overdue bonds

³ 311 U. S. 223, 236 (1940).

⁴ 315 U. S. 447, 466 (1942).

⁵ 313 U. S. 487 (1941).

⁶ *Ruhlin v. New York Life Insurance Co.*, 304 U. S. 202, 205 (1938); *Russell v. Todd*, 309 U. S. 280, 287, 294 (1940).

⁷ 130 F. (2d) 93 (C. C. A. 3, 1942).

⁸ *Board of Commissioners v. United States*, 308 U. S. 343 (1939); *Deitrick v. Greaney*, 309 U. S. 190 (1940); *Royal Indemnity Co. v. United States*, 313 U. S. 289 (1941); *D'Oench, Duhme & Co., Inc. v. Federal Deposit Insurance Corporation*, 315 U. S. 447 (1942).

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was liable even though the note was given prior to the formation of the Federal Deposit Insurance Corporation.

Then in footnote 6 on page 95 he made the following interesting comment on the *D'Oench* case:

The concurring opinion of Mr. Justice Jackson called for a more express delimitation of *Erie R. Co. v. Tompkins* and *Klaxon Co. v. Stentor Electric Mfg. Co.*, 1941, 313 U. S. 487, than the majority thought it necessary to make. The majority, by stating that the question was a federal one in the particular case obviously were *not called upon*, in order to decide it, *to determine whether Erie R. Co. v. Tompkins was irrelevant in all cases not based upon diversity of citizenship*. The question was avoided in *United States v. Bethlehem Steel Corporation*, 1942, 315 U. S. 289. [Italics supplied.]

The body of the opinion then continued on page 95:

In the absence of an authoritative decision by the Supreme Court of the United States to the effect that *Erie R. Co. v. Tompkins* applies only in cases of diversity of citizenship a subordinate federal tribunal would be exhibiting uncalled for temerity in offering such generalizations. We do not do so here. But we do think, however, that in this case the facts in litigation originate fully as directly from the Constitution and statutes of the United States as in the Supreme Court cases just mentioned and in this case, as well as in those, the federal courts are not bound in their determination of the legal consequences of the transaction by what the courts of the state, where the operative facts occurred, have held with regard to the general question involved.

Third. As yet it is not certain to what extent such nondiversity questions at law not specifically covered by congressional legislation will nevertheless be held by the Court to arise under the Constitution and laws of the United States⁹ and so to be governed only by Federal law, exempt from the *Erie* rule. There is no doubt however that the Federal field is being extended and that by so much the effect of the *Erie* doctrine is being cut down.

It has been pointed out,¹⁰ for example, that Federal adjudication of common law questions in numerous fields which the Congress has evinced its intention to "occupy" seems unshaken by the *Erie* holding. Note has also been taken¹¹ of the tendency toward considering matters relating to contracts with the Federal Government as being in the Federal field, even though not specifically covered

⁹ The Rules of Decision Act provides: "The laws of the several States, *except where the Constitution, treaties, or statutes of the United States otherwise require or provide*, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply." [Italics supplied.] Act of September 24, 1789; ch. 20, sec. 34 (1 Stat. 92, Rev. Stat. sec. 721, 28 U. S. C. sec. 725).

¹⁰ McCormick and Hewins, "The Collapse of 'General' Law" (1938) 33 Ill. L. Rev. 126, 143.

¹¹ Notes (1941-1942) 9 U. of Chi. L. Rev. 113, 308, 318; *United States v. Clearfield Trust Co.*, 130 F. (2d) 93, 95, fn. 6 (C. C. A. 3, 1942).

by legislation.¹² Moreover, the technique and the reasoning used in *Board of Commissioners of Jackson Co., Kansas v. United States*,¹³ have been applied by the Court in a number of cases to which the United States or one of its agencies or officers is a party.

In the *Jackson County* case, a suit to recover taxes illegally collected from an Indian ward of the Government, the Court held that the State law did not control as to the right to recover interest prior to judgment on the taxes withheld. Since the Indian was exempt from taxation by virtue of the treaty with her tribe and since the Congress had not specifically defined the relief to be granted for loss suffered through denial of the tax exemption, the Congress was said to have left such remedial details to judicial implication. Speaking for the Court, Mr. Justice Frankfurter said at pages 349, 350:

Since the origin of the right to be enforced is the Treaty, plainly whatever rule we fashion is *ultimately attributable* to the Constitution, treaties or statutes of the United States, and does not owe its authority to the law-making agencies of Kansas. Cf. *Erie R. Co. v. Tompkins*, 304 U. S. 64. *And so the concrete problem is to determine the materials out of which the judicial rule * * * should be formulated.* * * * Instead of choosing a rigid rule, the Court has drawn upon those flexible considerations of equity which are established sources for *judicial law-making*. [Italics supplied.]

Clearfield Trust Co. v. United States,¹⁴ the nondiversity case mentioned above, involved the right of the United States to recover from one presenting for payment a cheque upon which the payee's endorsement had been forged. The Court, speaking through Mr. Justice Douglas on March 1, 1943, agreed with Judge Goodrich, *supra*, that the *Erie* rule did not apply and decided the issue as a Federal question, although there was no applicable act of Congress. In the absence of such a statute, the Court followed the pattern of the *Jackson* decision. It reasoned that when the United States disburses its funds or pays its debts it exercises a constitutional function or power and that the rights and duties of the United States on commercial paper so issued are therefore governed by Federal rather than local law. The authority to issue the cheque in this case had its origin in the Constitution and the statutes of the United States and was in no way dependent on the laws of any State. The duties imposed upon the United States and the rights acquired by it as a result of the issuance find *their roots in those Federal sources and in the Regulations of the Treasury*.

¹² But cf. Bikle, "The Silence of Congress" (1927), 41 Harv. L. Rev. 200.

¹³ 308 U. S. 343 (1939).

¹⁴ 318 U. S. 363 (1943), *aff'd* 130 F. (2d) 93 (1942).

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As to the Federal rule to be applied to protect the Federal rights, the Court said significantly, at page 367:

In absence of an applicable Act of Congress it is for the federal courts to fashion the governing rule of law *according to their own standards*. * * *

In our choice of the applicable federal rule we have *occasionally selected* state law. See *Royal Indemnity Co. v. United States*, 313 U. S. 289. But reasons which may make state law at times the appropriate federal rule are singularly inappropriate here. The issuance of commercial paper by the United States is on a vast scale and transactions in that paper from issuance to payment will commonly occur in several states. The application of state law * * * would subject the rights and duties of the United States to exceptional uncertainty. *It would lead to great diversity in results by making identical transactions subject to the vagaries of the laws of the several states.* The desirability of a uniform rule is plain. And while the federal law merchant, developed for about a century under the regime of *Swift v. Tyson*, 16 Pet. 1, represented general commercial law *rather than a choice of a federal rule designed to protect a federal right*, it nevertheless stands as a convenient source of reference for fashioning federal rules applicable to *these federal questions*. [Italics supplied.]

In connection with the Court's refusal to apply the *Erie* rule in these cases in its subject-matter jurisdiction, it is noteworthy that the doctrine may be deemed inapplicable even in diversity cases when the question involves a Federal policy. In *Sola Electric Co. v. Jefferson Electric Co.*,¹⁵ a diversity case, the language of Mr. Chief Justice Stone, citing the *Jackson County* case and others similar, is striking. Speaking of certain prohibitions by the Sherman Act, the Chief Justice said:

It is familiar doctrine that the prohibition of a federal statute may not be set at naught, or its benefits denied, by state statutes or state common law rules. In such a case our decision is not controlled by *Erie R. Co. v. Tompkins*, 304 U. S. 64. There we followed state law because it was the law to be applied in the federal courts. But the doctrine of that case is inapplicable to those areas of judicial decision within which the policy of the law is so dominated by the sweep of federal statutes that legal relations which they affect must be deemed governed by federal law having its source in those statutes, rather than by local law. *Royal Indemnity Co. v. United States*, 313 U. S. 289, 296; *Prudence Corp. v. Geist*, 316 U. S. 89, 95; *Board of Comm'rs v. United States*, 308 U. S. 343, 349-50; cf. *O'Brien v. Western Union Telegraph Co.*, 113 F. 2d 539, 541. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions, the answers to which are to be derived from the statute *and the federal policy* which it has adopted. To the federal statute *and policy*, conflicting state law and policy must yield. Constitution, Art. VI, cl. 2; *Awotin v. Atlas Exchange Bank*, 295 U. S. 209; *Deitrick v. Greaney*, 309 U. S. 190, 200-01. [Italics supplied.]

¹⁵ 317 U. S. 173, 176 (1942).

Fourth. The *Jackson County* and *Clearfield* decisions with others of the same pattern, notably *Deitrick v. Greaney*,¹⁶ *Royal Indemnity Co. v. United States*¹⁷ and *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*,¹⁸ are suggestive not only as placing limitations on the application of the *Erie* rule in the subject-matter jurisdiction of the court but also, in the view of Circuit Judge Haney,¹⁹ as demonstrating that the statement in *Erie* "There is no federal general common law"²⁰ is "in words too broad, because it is apparent that in such cases such law is applied."

This observation by Circuit Judge Haney occasions no surprise. That the Brandeis declaration in *Erie* did not completely annihilate Federal common law was established by no less a personage than Mr. Justice Brandeis himself. On the very day that he delivered the *Erie* opinion, Justice Brandeis, speaking for the court in *Hinderlider v. La Plata Co.*,²¹ a nondiversity case, avowed, at page 110, that—

Whether the water of an interstate stream must be apportioned between the two states is a question of "federal common law" upon which *neither the statutes nor the decisions of either state* can be conclusive. [Italics supplied.]

The Justice did not refer to *Erie R. Co. v. Tompkins* by name but the words here underlined and the quotation marks around "federal common law" show that he had well in mind the *Erie* decision and his broad statement about "no federal general common law."

Since then, comments on the point have been numerous. An early article²² (1938) on the decision, in discussing the doctrine of occupying the field, said:

Where Congress has thus occupied the ground, the governing law for cases within the "field" but not covered by the statute itself, would seem to be the rule of "common law," not the rules evolved by the courts of the state where the transaction occurred, but *rules independently ascertained as Federal decisional law*. [Italics supplied.]

and it found this rule unaffected by *Erie*. Another writer, speaking of common law issues presented in patent, bankruptcy, taxation, bank and other cases under the subject-matter jurisdiction of the court, found specialized Federal common law for such controversies not

¹⁶ 309 U. S. 190 (1940).

¹⁷ 313 U. S. 289 (1941).

¹⁸ 315 U. S. 447 (1942).

¹⁹ *Alameda County v. United States*, 124 F. (2d) 611, 616 (C. C. A. 9, 1941).

²⁰ Sentence 3 in Excerpt, *supra*, p. 696.

²¹ 304 U. S. 92, 110 (1938).

²² McCormick and Hewins, *op. cit.*, *supra*, note 10.

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inconsistent with the *Erie* statement, interests being affected which are not involved in diversity cases.²³

Federal judges also have spoken out on the point. In 1940 Circuit Judge Magruder said in *O'Brien v. Western Union Telegraph Co.*²⁴:

Notwithstanding *Erie Railroad Co. v. Tompkins*, 1938, 304 U. S. 64, * * * there *still exist* certain fields—and this is one—where legal relations are governed by a “federal common law,” a *body of decisional law developed by the federal courts untrammelled by state court decisions*. See *Hinderlider v. La Plata Co.*, 1938, 304 U. S. 92, 110 * * *; *Board of Commissioners of Jackson County v. United States*, 1939, 308 U. S. 343 * * *; *Illinois Central Railroad Co. v. Moore*, 5 Cir., 112 F. 2d 959 * * *; *McCormick & Hewins, The Collapse of “General” Law in the Federal Courts* (1938), 33 Ill. L. Rev. 126, 143-44. [Italics supplied.]

On March 2, 1942, Mr. Justice Jackson, in a concurring opinion in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corporation*²⁵ discussed the question of Federal common law at some length.²⁶ Although the opinions expressed are not officially those of the court, the course of the court leaves little doubt that they are shared by the other justices. The whole opinion therefore merits close examination but the following passages are especially to be noted at pages 468, 469, 470, 471 and 472:

Although by Congressional command this case is to be deemed one arising under the laws of the United States, no federal statute purports to define the Corporation's rights as a holder of the note in suit or the liability of the maker thereof. There arises, therefore, the question whether in deciding the case we are bound to apply the law of some particular state or whether, to put it bluntly, we may make our own law from materials found in common-law sources.

* * * The federal courts have no *general* common law, as in a sense they have no general or comprehensive jurisprudence of any kind, because many subjects of private law which bulk large in the traditional common law are ordinarily within the province of the states and not of the federal government. *But this is not to say that wherever we have occasion to decide a federal question which cannot be answered from federal statutes alone we may not*

²³ Shulman, “The Demise of *Swift v. Tyson*” (1938) 47 Yale L. J. 1336, 1350.

“A. L. C.” writes an amusing tag to this article. Agreeing that there is “no federal general common law” in the Holmes sense that there is no “brooding omnipresence in the sky,” A. L. C. inquires whether there is an omnipresence brooding over the State of Pennsylvania, whose law the harassed trial court was now to apply to Mr. Tompkins. He concluded by saying of the statement “if it is a direction to substitute an omnipresence brooding over Pennsylvania alone, in place of the roc-like bird whose wings have been believed to overspread 48 states, something has indeed been lost.”

²⁴ 113 F. (2d) 539, 541 (C. C. A. 1, 1940).

²⁵ 315 U. S. 447, 465, 468-472.

²⁶ See also Justice Jackson's address, “The Rise and Fall of *Swift v. Tyson*,” 24 A. B. A. Jour. 609, delivered before the A. B. A. Section of Real Property, Probate and Trust Law at Cleveland on July 25, 1938, while Justice Jackson was still Solicitor General of the United States. For further discussion of the question “Is there a federal common law?” see Dobie on *Federal Procedure*, Section 145, pp. 576-578.

resort to all of the source materials of the common law, or that when we have fashioned an answer it does not become a part of the federal non-statutory or common law. [Italics supplied.]

Continuing, the Justice then commented on the *Erie* decision, as follows:

I do not understand Justice Brandeis's statement in *Erie R. Co. v. Tompkins*, 304 U. S. 64 at 78, that "There is no federal general common law," to deny that the common law may in proper cases be an aid to, or the basis of, decision of federal questions. In its context it means to me only that federal courts may not apply their own notions of the common law at variance with applicable state decisions except "where the constitution, treaties, or statutes of the United States [so] require or provide." Indeed, in a case decided on the same day as *Erie R. Co. v. Tompkins*, Justice Brandeis said that "whether the water of an interstate stream must be apportioned between the two States is a question of 'federal common law' upon which neither the statutes nor the decisions of either State can be conclusive." *Hinderlider v. La Plata Co.*, 304 U. S. 92, 110. Were we bereft of the common law, our federal system would be impotent.

* * * * *

* * * recognitions of our common-law powers abound in the Constitution.

After pointing out that a Federal court sitting in a nondiversity case like the *D'Oench* case does not sit as a local tribunal, Justice Jackson said of such a Federal court:

In some cases it may see fit for special reasons to give the law of a particular state highly persuasive or even controlling effect, but in the last analysis its decision turns upon the law of the United States, not that of any state. Federal law is no juridical chameleon, changing complexion to match that of each state wherein lawsuits happen to be commenced because of the accidents of service of process and of the application of the venue statutes. It is found in the federal Constitution, statutes, or common law. *Federal common law* implements the federal Constitution and statutes, and is conditioned by them. *Within these limits, federal courts are free to apply the traditional common-law technique of decision and to draw upon all the sources of the common law in cases such as the present.* *Board of Commissioners v. United States*, 308 U. S. 343, 350. [Italics supplied.]

Fifth. The Department of Justice, it appears from informal inquiry in both the appeal and the trial section of the Lands Division and from examination of the Government's briefs in some of the Supreme Court cases since the *Erie* decision, seems to be of opinion that the *Erie* doctrine is applicable only to diversity cases and unlikely to be invoked in cases in which the United States is a party. The Department has therefore not changed its practice in trespass and conversion cases to conform with the *Erie* rule nor, as things are, does it intend to do so.

In 1939, the Government made the *Jackson County* case the basis of its petition for certiorari in *Standard Oil Company of California v. United States*, 107 F. (2d) 402 (C. C. A. 9, 1939). Its brief said:

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When the United States tried the *Standard Oil* case, it accepted the *Mason* case²⁷ as determining that State law controls. But it considers that the Supreme Court decision in *Board of Commissioners of Jackson County v. United States* casts new light on that question and clearly indicates that federal not state law is determinative.

* * * * *

In this suit to obtain an accounting for the conversion of oil which respondent had extracted from a naval petroleum reserve the United States is enforcing a federal right. In the *Jackson County* case it was held that federal law controlled when the right enforced sprang from a tax exemption created by treaty. *It is submitted that federal law likewise controls when the right to be enforced springs from the holding of property by the government in a sovereign capacity under the Constitution.* See Art. IV, sec. 3, cl. 2; *Utah Power & Light Co. v. United States*, 243 U. S. 389, 404.

The measure of damages, then, is a matter of federal law as to which a court may, in the absence of federal legislation, formulate a judicial rule. The remaining question is what that rule should be. [*Italics supplied.*]

In reply, *Standard Oil* pointed out the rule forbidding a party to reject on appeal his own trial theory and showed that *by agreement* all parties proceeded below on the theory that if a trespass was committed the measure of damages was to be that prescribed by the applicable State statute. It also showed admissions to this effect in the Government's brief in the Circuit Court of Appeals and in its cross-petition. On January 29, 1940, the Court denied certiorari.²⁸

This unexplained action is not considered ground however for assuming that the Court in fact refused to regard the issue as presenting a Federal question. It is thought possible that the court may have felt constrained to the denial by the nature of the company's objections and the Government's own course below but that it may actually have shared the Government's views described in its petition. Moreover, it is considered that the Court's pronouncements since this action in the *Standard Oil* case reinforce the Government's argument therein, extend the doctrine of the *Jackson County* case, relied on by the Government, and are suggestive of an expanding definition of Federal questions. This widened definition would seem to embrace these trespass matters and, if the trespass issue were to be squarely presented to the court, would probably bring a modification of the court's *Mason* case position that local statutes controlled.

Clearly, in civil trespass cases, despite the absence of specific Federal legislation, the Government's duties and its equivalent rights respecting public lands are not derived from the law of any State

²⁷ *Mason v. United States*, 260 U. S. 545 (1923).

²⁸ 309 U. S. 654 (1940).

but, like the duties and rights of the Government in the *Jackson County* and *Clearfield* cases, find their roots in Federal sources, both law and policy. For it is in pursuance of Constitutional authority that the Congress has occupied the field of public lands and their resources and enacted the countless statutes known as "public land law." This great body of law provides not only for the use and disposal of this Government wealth but for its administration and preservation as long as it remains in Government ownership. It also devolves upon appropriate administrative and enforcement agencies the duty of protecting and enforcing the Government's rights in it whenever they are threatened or violated.

Moreover, not only in the express terms of penal statutes condemning certain acts as criminal trespass but in the necessary legal implications of permissive statutes authorizing Government properties to be occupied, used or acquired through compliance with prescribed and therefore lawful methods, this great sweep of statutes manifests a Federal policy to condemn as both the crime and the tort of trespass certain acts which are unauthorized by statute and to hold the trespasser to both criminal and civil account therefor. These facts may well be thought to reinforce the contention that the rights and duties involved in these trespass matters, springing as they do from the holding of property by the Government in a sovereign capacity under the Constitution, are primarily Federal questions.

Sixth. From this reasoning it would follow that there is no legal compulsion upon the Land Department to seek the rules for the measure of trespass damages in "the laws of the several States," unwritten or written. Not only would the *Erie* decision be inapplicable but the *Mason* decision of 1923 would lose its force. There would be no obligation on the Department under the former decision to seek out and obey the rules of State courts in those cases in which it is now observing rules prescribed by Federal tribunals. Nor would the Department any longer be required under the latter decision to obey the rules of State statutes as at present it does whenever such statutes exist.²⁹

Correspondingly, it would be unnecessary to inform field agents of the inapplicable requirements of the *Erie* decision. But it would be necessary to inform them that trespass on Federal lands had been found to involve a Federal question, controlled by Federal court rules, and that therefore the Department must henceforth in all cases have Federal court rules in mind when negotiating with trespassers or in preparing cases for trial or prosecution by the De-

²⁹ 43 Code of Federal Regulations 288.1-288.6, inclusive.

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partment of Justice. It should be remarked moreover in connection with these several results that exactly similar consequences would flow from enactment of the Department's proposed draft bill to prescribe uniform rules for the measure of damages in trespass cases, a bill now being reviewed in this office.

Seventh. All the foregoing considerations are fairly persuasive, I think, both that the *Erie* decision is inapplicable here and that, by force of reasoning like that of the Department of Justice in the *Standard Oil* case and of the Supreme Court in the recent cases cited, trespass on Federal lands is a Federal question controlled by Federal law under the exception in the Rules of Decision Act.³⁰ If therefore the Department were to decide to act on this assumption, there would be no legal reason why departmental information to agents should either set forth the requirements of the *Erie* case or continue to carry those of the *Mason* case. At present, however, there is no compelling legal reason why the Department should act on this assumption.

In the circumstances therefore I suggest that you withdraw the proposed amendments to Title 43 insofar as they affect sections 288.1 to 288.6, both inclusive. As for sections 288.9 and 288.10, concerning procedure in coal trespass cases, there seems to be no reason why the Department should not approve your proposed clarification of the present instructions to agents, if you wish to present them independently.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

BENJAMIN WARNER
BONNIE B. MAKINSON

Decided May 12, 1944

PUBLIC LANDS—UNAUTHORIZED USE AND OCCUPANCY OF LANDS WITHDRAWN FOR
STOCK DRIVEWAY—SETTLEMENT—TRESPASS—DAMAGES.

The settlement and improvement of lands in the public domain expressly withdrawn from settlement and entry create no rights in the occupant but constitute an unlawful use, rendering the occupant liable for damages in trespass. *Held:* One who occupies lands within a stock-driveway withdrawal and constructs thereon dwellings, barns, pens, corrals, shops, filling stations and buildings for other commercial enterprises is not a settler,

³⁰ *Supra*, fn. 9.

possessed of the settlement rights recognized by the courts, but a trespasser who must respond in damages for his unlawful use of another's land.

MEASURE OF DAMAGES IN CASES OF CONTINUOUS TORTIOUS USE FOR TORT-FEASOR'S OWN PURPOSES AND GAIN—WORTH OF THE USE ACTUALLY MADE BY TORT-FEASOR.

When a trespasser not only injures an owner by depriving him of his chosen use of his property or of his privilege of withholding it from use but also tortiously uses that property for his own purposes and gain, the damages for which he is responsible are determinable not by reference to the value of what the owner might have done with his property but by reference to the value of what the tort-feasor actually did with it. *Held*: That one who without authority uses lands in a stock driveway for his own purposes, building thereon structures for diverse uses and conducting thereon diverse commercial enterprises is liable not for the worth of some different use, such as grazing, which the Government might have made of the lands but for the worth of the use which he makes of the land, namely, the reasonable rental value of that use, its extent and duration both being considered.

AMOUNT OF DAMAGES CONTROLLED BY RULES OF TRESPASS, NOT BY REGULATIONS FOR LAWFUL USES.

Damages for unlawful uses of Government lands are controlled by the law of trespass and its rules for the measure of damages, not by provisions of statutes or of regulations fixing charges for corresponding lawful uses. *Utah Power and Light Company v. United States*, 243 U. S. 389, 411.

CHAPMAN, *Assistant Secretary*:

In connection with certain matters involving use and occupancy of public lands in trespass I have recently had occasion to refer to the cases of Benjamin Warner and Bonnie B. Makinson,¹ whom the Department has held obligated to recompense the United States for certain unauthorized uses of public lands. In considering the decision in these cases I find that the rule which it states for measuring the damages resulting from the trespass is at variance with the rule laid down by the Federal courts in *United States v. Bernard*, 202 Fed. 728 (1913), and *Utah Power and Light Co. v. United States*, 243 U. S. 389, 411 (1917), and therefore requires correction.

The facts in the *Warner* and *Makinson* cases are as follows: On February 8, 1943, the Commissioner of the General Land Office made an administrative ruling requiring Benjamin Warner to pay \$962.50 for his use and occupancy in trespass during 19 years and 3 months of 80 acres of land included within stock-driveway withdrawal No. 56, Arizona No. 2, and described as follows: T. 8 N., R. 2 E., G. and S. R. M., Arizona, Sec. 10, W $\frac{1}{2}$ SW $\frac{1}{4}$.

According to the Commissioner's findings, Warner had used the lands not only for residence purposes but for a business site as well,

¹ "L" 1911043, A. 23604.

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conducting several commercial enterprises thereon, including a general merchandise store and a filling station, and that he had erected improvements of an estimated value of \$15,000. There were placed on the property the following structures: one concrete block residence, 14 x 28 ft.; one modern 5-room frame house, 28 x 34 ft.; one unfinished tufa stone residence; one galvanized sheet-iron garage, 30 x 30 ft.; one galvanized sheet-iron barn, 28 x 32 ft.; one power pump-equipped well, 92 ft. deep; one power pump-equipped spring, cemented and walled; septic tanks, water troughs and all necessary modern facilities for residence, business and stock raising. In addition, there is fencing,—1½ miles of 6-strand barbed wire fence with steel posts and ½ mile of Paige wire fence, also with steel posts.

Also on February 8, 1943, the Commissioner by a similar ruling required Bonnie B. Makinson to pay \$294.08 for his unauthorized use and occupancy during a period of 9 years, 9 months and 19 days of 40 acres of land included within the same stock driveway and described as follows: T. 10 N., R. 2 E., G. and S. R. M., Arizona, Sec. 17, NE¼ SE¼. Makinson, the Commissioner found, had used this land for a home and also for the business of a mohair goat ranch, erecting not only a substantial, modern, 5-room home but corrals, goat sheds, dipping vat and shearing pans, at a total conservative estimate of at least \$3,800.

In connection with Makinson's goat raising the record shows that Makinson *erected no fences*. Although he usually owned and ran from 1,500 to 2,500 head of goats, ostensibly on one 40-acre tract, he actually ran his herd in continuous trespass not only on this forty but on 17 *sections* of stock-driveway land to which he had easy access from the unfenced, strategically placed subdivision which he was unlawfully occupying. The normal carrying capacity of these 17 sections year long was 680 goats, 40 goats per section. By running from two to three times that number on these lands Makinson did great injury to the lands through serious overgrazing with much resulting erosion.

The use, the occupancy and the erection of the improvements described all were unauthorized and constituted a trespass against the United States. The Commissioner therefore held in each case that the Government was entitled to recover the reasonable value of the use made of the land, considering its extent and duration, even though the trespasser may have entered into such use in good faith. He therefore demanded the sums above named as the reasonable worth of the use, in the *Warner* case at the rate of \$50 per year and in that of *Makinson* at \$30. As authority for the rule applied, the Commis-

sioner cited *Utah Power and Light Co. v. United States*, 243 U. S. 389, 411 (1917).

From these rulings Warner and Makinson appealed, neither of them on the ground that the sum demanded was in excess of the value of the use enjoyed but both on the ground that for the Government to demand any sum at all was contrary to its established policy toward the use and occupation of public lands by pioneers, among whom appellants asserted a right to be classed.

In answer thereto, the Department's decision of May 14, 1943, covering both cases, pointed out that it had *never* been the policy of the Government to recognize the settlement or the improvement of lands expressly withdrawn or reserved therefrom, as these lands had been, as creating any rights in the settler. It therefore upheld the Commissioner's ruling that appellants were obligated to make reasonable compensation to the Government for their unlawful use and occupancy of the respective lands. But it modified the Commissioner's ruling by directing that the compensation recoverable should be the value of the use of the lands for stock-driveway or grazing purposes of which the Government had been deprived.

The rule, however, that in certain cases a recovery is limited to the value of the use and occupation to the owner or to the damages to the freehold is not here applicable. The cases² quoted by the decision as authority for the position taken involved involuntary trespass by the flooding³ of certain lands, resulting in injury to the owners by depriving each of his use of his lands and by doing substantial detriment to the corpus of his lands. They did not present the element here present, namely, a continuing tortious use of the lands by the tort-feasors for their own purposes and benefit. This element takes this type of trespass out of the rule stated in the decision and places it in the category of trespasses in which the tort-feasor is required to respond in damages for the actual or reasonable value of the use made of the property by him.⁴

² *Sacchi v. Bayside Lumber Co.*, 108 Pac. 885, 13 Calif. App. 72; *Worcester v. Great Falls Mfg. Co.*, 66 Amer. Dec. 217, 41 Me. 159.

³ In the *Sacchi* case by the loosening of a debris jam; in the *Worcester* case by the erection of a dam downstream.

⁴ *United States v. Bernard*, 202 Fed. 728 (1913); *Utah Power and Light Co. v. United States*, 243 U. S. 389, 411 (1917); *McWilliams v. Morgan*, 75 Ill. 473; *Western Book and Stationery Co. v. Jevne*, 179 Ill. 71, 53 N. E. 565; *Eno v. Christ*, 25 Misc. Rep. 24, 54 N. Y. Supp. 400; *Bunke v. New York Telephone Co.*, 110 App. Div. 241, 97 N. Y. Supp. 66, affirmed in 188 N. Y. 600, 81 N. E. 1161; *Jacob Tome Institute v. Crothers*, 87 Md. 569, 40 Atl. 261; *DeCamp v. Bullard*, 159 N. Y. 450, 54 N. E. 26; *Lancaster and J. E. L. Co. v. Jones*, 75 N. H. 172, 71 Atl. 871; *Baltimore and Ohio R. Co. v. Boyd*, 67 Md. 32, 10 Atl. 315; *Carl v. Sheboygan R. Co.*, 46 Wisc. 625, 1 N. W. 295; *Whitwham v. Westminster Brymbo Coal and Coke Co.* (1893 W. 1662) 2 Chancery (1896) 538, pp. 542-544 (in library of Department of Justice); *Bourdieu v. Seaboard Oil Corporation*, 119 P. (2d) 973, 977, 978 (1942); *Sutherland, Damages*, 4th ed., vol. IV, secs. 1014, 1023.

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To a claim for damages thus measured, it is no answer to say that the owner would have put his land to a use different from that to which the trespasser applied it, one perhaps less remunerative, or even to no use at all and that he should therefore be compensated only accordingly. When a trespasser not only injures an owner by depriving him of his chosen use of his property or of his privilege of withholding it from use but also tortiously uses that property for his own purpose and gain, the damages recoverable are properly determined by reference not to the value of what the owner might have done with his property but to the value of what the tort-feasor actually did with it. He is therefore held liable for the actual worth of the use which he made of it. This however is not to be understood as commensurate with the benefits or profit derived from the unlawful use but is commonly the fair rental value of that use. Nor is the owner's right to recover on this basis dependent upon his receipt of any income from the land.

Moreover, damages for trespass are in no event to be controlled by provisions of statutes or of regulations which fix charges for *lawful* use of Government land. *The Utah Power and Light Company* case so held.⁵ In that case, in which appellants were found to have committed continuing trespass upon reserved lands of the United States, the damages which the United States prayed to recover were simply amounts equivalent to charges prescribed by regulations to be paid by a lawful permittee of the Government for a use similar to that which appellants had unlawfully made of the lands. But as to that prayer, Mr. Justice Van Devanter, speaking for the Court, held as follows:

As the defendants have been occupying and using reserved lands of the United States without its permission and contrary to its laws, we think it is entitled to have appropriate compensation therefor included in the decree. The compensation should be measured by the reasonable value of the occupancy and use, considering its extent and duration, *and not by the scale of charges named in the regulations as prayed in the bill.* However much *this scale of charges* may bind one whose occupancy and use are under a license or permit granted under the statute, it *cannot be taken as controlling what may be recovered from an occupant and user who has not accepted or assented to the regulations in any way.* [Italics supplied.]

In the instant cases, the decision of May 14, 1943, was in error in directing the Commissioner to limit the Government's demand to the value of the stock driveway and grazing uses of which appellants had deprived the public and the Government under such regulations or policy as were applicable thereto. In so far therefore as that limita-

⁵ *Utah Power and Light Co. v. United States*, 243 U. S. 389, 411 (1917).

tion is concerned the decision of May 14, 1943, must be modified. Appellants will be held liable for the reasonable value of their use and occupancy of the lands in the light of both the duration and the extent of such use and occupancy, independently ascertained in accordance with the applicable legal principles. The Commissioner will therefore ascertain and demand damages in accordance with the views herein expressed.

Finally, it is to be remarked that persons who erect buildings or fences on stock driveways and obstruct free passage thereover make themselves liable to criminal prosecution for violation of the Unlawful Inclosures Act of February 25, 1885 (23 Stat. 321, 43 U. S. C. secs. 1061-1066), and further that their structures are subject to claim by the Government as fixtures.

The decision of May 14, 1943, is modified in accordance with the views herein expressed.

Modified.

C. W. GRIER AND GEORGE ETZ

Decided May 12, 1944

Motion for Rehearing decided October 23, 1944

OIL AND GAS LANDS—LEASE—ASSIGNMENT—REGULATION.

Since assignments of oil and gas leases may be made only with the approval of the Secretary of the Interior, the Secretary may by regulation establish the legal relationship resulting from the approved assignment, for the power to grant or withhold consent or approval includes the power to impose reasonable conditions in giving consent.

OIL AND GAS LANDS—LEASE—ASSIGNMENT—LEGAL RELATIONSHIP.

The Secretary of the Interior has by regulation established the legal relationship between the United States and the lessees and assignees of portions of oil and gas leases upon approval by the Secretary. Such assigned portions of leases are to be considered segregated as new leases and such assignees are to stand in the same position as though the leases had been issued to them originally pursuant to an application therefor.

OIL AND GAS LANDS—LEASE—ASSIGNMENT—DISCOVERY.

As a result of the legal relationship established by the Secretary of the Interior, the assignor (original lessee) and the assignee of a portion of an oil and gas lease hold segregated leases which for all purposes are the same as though they had been issued separately, and either lease will continue beyond the initial term only if oil or gas is discovered and produced on that particular lease.

OIL AND GAS LEASES—REGULATIONS.

Circular 960 of August 19, 1924 (43 CFR, Cum. Supp., 192.41a), is applicable to 5- and 10-year leases issued under the amendatory act of August 21, 1935

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(49 Stat. 674), as well as to 20-year leases issued theretofore, and the regulation is not inconsistent with section 2(p) of such 5- and 10-year leases.

CHAPMAN, *Assistant Secretary*:

By telegram dated October 29, 1943, the Acting Commissioner of the General Land Office ruled that until an assignment of an oil and gas lease is approved, discovery inures to the benefit of the entire lease; that upon approval of an assignment by the Department, only the area assigned, containing a discovery well, is extended beyond the initial term while the remaining unassigned portion, lacking a discovery well, terminates; that an assignment, on approval, operates to segregate the listed lands under a separate lease; and that if by virtue of a discovery on the assigned portion of the lease the land in the unassigned portion is classified as being within a producing structure, the lease as to the unassigned portion will terminate at the end of the term for which it was issued and the lessee will not have a preference right to a new lease under the act of July 29, 1942 (56 Stat. 726).

C. W. Grier and George Etz have appealed from the foregoing ruling insofar as it is applicable to their leases.

The Grier lease, an exchange oil and gas lease, was issued on December 31, 1938, for the S $\frac{1}{2}$ Sec. 20, Secs. 21 and 29, S $\frac{1}{2}$ Sec. 30, and Sec. 31, T. 16 S., R. 31 E., N. M. P. M. On May 13, 1941, C. W. Grier and wife assigned the lease in part to Nay Hightower, covering the N $\frac{1}{2}$ SE $\frac{1}{4}$ Sec. 20, W $\frac{1}{2}$ NE $\frac{1}{4}$, E $\frac{1}{2}$ SE $\frac{1}{4}$, E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 21, N $\frac{1}{2}$ NE $\frac{1}{4}$ Sec. 29, E $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 30, NW $\frac{1}{4}$, S $\frac{1}{2}$ NE $\frac{1}{4}$, W $\frac{1}{2}$ SE $\frac{1}{4}$, N $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 31, T. 16 S., R. 31 E., N. M. P. M. The assignment was filed in the General Land Office on September 19, 1941, and was approved by the Secretary of the Interior on September 11, 1942.¹ Prior to the approval of the assignment by the Secretary, the assignee on October 3, 1941, discovered oil and gas in commercial quantities on the NW $\frac{1}{4}$ NW $\frac{1}{4}$ Sec. 31, T. 16 S., R. 31 E., N. M. P. M. C. W. Grier retained and still has in his name the S $\frac{1}{2}$ SW $\frac{1}{4}$ Sec. 20, W $\frac{1}{2}$ W $\frac{1}{2}$ Sec. 21, N $\frac{1}{2}$ NW $\frac{1}{4}$, NE $\frac{1}{4}$ SE $\frac{1}{4}$, SW $\frac{1}{4}$ SE $\frac{1}{4}$ Sec. 29, T. 16 S., R. 31 E., N. M. P. M.

The facts in connection with the Etz lease will not be detailed in this decision. They are substantially the same, except for the land involved, as those existing in the Grier lease, with the further exception that the Etz assignment has not yet been approved by the Sec-

¹ A number of other assignments executed by Grier at about the same time, later filed in the General Land Office and approved by the Secretary of the Interior, have no bearing on the instant case.

retary. Until the approval of the Etz assignment the Assistant Commissioner's ruling does not affect it and after such approval it will stand in the same position as the Grier lease.

The question presented is whether the lease will expire as to the lands retained by Grier at the end of the initial term,² or whether the lease will continue in effect as to these lands by reason of the discovery and production on the lands assigned to Hightower. Since the lease is still in its initial term, the case is not formally before the Department and this decision, as in the case of the Assistant Commissioner's decision, must necessarily be in the nature of an advisory ruling.

The Mineral Leasing Act provides that oil and gas leases of lands not within any known geological structure of a producing field "shall be for a period of five years and so long thereafter as oil or gas is produced in paying quantities." 30 U. S. C. sec. 226. The pertinent sections of the lease are as follows:

Sec. 1. *Rights of Lessee*.—That the lessor in consideration of rents and royalties to be paid, and the conditions and covenants to be observed as herein set forth, does hereby grant and lease to the lessee the exclusive right and privilege to drill for, mine, extract, remove, and dispose of all the oil and gas deposits in or under the following-described tracts of land * * * for a period of five years, and so long thereafter as oil or gas is produced in paying quantities.

Sec. 2. In consideration of the foregoing, *the lessee hereby agrees*:

* * * * *

(p) *Assignment of Lease*.—Not to assign this lease or any interest therein by an operating agreement or otherwise, nor to sublet any portion of the leased premises, except with the consent in writing of the Secretary of the Interior first had and obtained.

Thus, it is seen that the lands described in the lease are leased "for a period of five years, and so long thereafter as oil or gas is produced in paying quantities," and that the "lease or any interest therein" may be assigned by the lessee only with the written consent of the Secretary of the Interior.

Circular 960 of August 19, 1924, signed by the Acting Commissioner of the General Land Office and approved by the First Assistant Secretary of the Interior (Circulars and Regulations of the General Land Office, 1930, p. 930), provides in part as follows:

Where an assignment is made of a part of the area described in an oil and gas lease, and said assignment is approved by the Secretary of the Interior, the assignee becomes a lessee of the Government as to the tract described and

² The initial term in the case of both the Grier and Etz leases has been extended to December 31, 1944, by the act of December 22, 1943 (57 Stat. 608).

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is bound by the terms of the lease the same as though he had obtained the lease to the said land through an application filed in his own name.

For the above reason it has been deemed advisable, in order that the production on the land segregated by the assignment may be properly accounted for, as well as the rental to be paid by the assignee on the particular tract assigned, to consider the assignment, after its approval by the Secretary of the Interior, as the basis of a new case on which a new serial number will be given * * *.

This regulation establishes the legal relationship between the United States and the lessees and assignees of portions of oil and gas leases upon approval by the Secretary of the Interior. It provides that such assigned portions of leases are to be considered segregated as new leases and that such assignees are to stand in the same position as though the leases had been issued to them originally pursuant to an application filed therefor. As a result, the assignor (original lessee) and the assignee hold segregated leases which for all purposes are the same as though they had been issued separately, and either lease will continue beyond the initial period only if oil or gas is discovered and produced on that particular lease, for this requirement extends both to the assigned and unassigned portions by reason of the segregation.

The power of the Secretary of the Interior to establish this legal relationship flows from the fact that assignments may be made only with his consent, and "where governmental consent is essential, the consent may be granted upon terms appropriate to the subject and transgressing no constitutional limitation." *James v. Dravo Contracting Co.*, 302 U. S. 134, 148. That is to say, the power to grant or withhold consent includes the power to impose reasonable conditions in giving consent. 36 Op. Atty. Gen. 29; 56 I. D. 174, 183; cf. *Montana Eastern Pipeline Company*, 55 I. D. 189, 191. The establishment of the legal relationship resulting from the approved assignment is such a condition and therefore valid.

This regulation has been consistently adhered to by the Department since its issuance in 1924. Thus, on March 17, 1927, instructions were issued by the Director of the Geological Survey to the various Supervisors of Oil and Gas Operations, also approved by the First Assistant Secretary of the Interior, which after referring to Circular 960, provided in part as follows:

In conformity with this rule, you will consider approved assignment of a part of the area of a lease as segregating the assigned portion for separate and individual consideration with respect to the drilling, production, and royalty requirements of the lease. As to the assigned portion of the lease, on approval of the assignment the assignee assumes each and every obligation of the original lease, and the assignor is relieved therefrom except as to any default made prior to the assignment. Thus, if an undrilled tract included in a lease be

assigned and the assignment be approved by the Secretary, the assignee should be required to begin drilling a well within three months of the approval, in compliance with Sec. 2(b) of the lease, even though the number of producing wells already on the original leasehold should equal or exceed the number of forty-acre tracts therein. Similarly, the other drilling and producing requirements of the lease are to be enforced with respect to the assigned portion just as though it were included in a separate or new lease.

Also, see 50 L. D. 652, 655 (1924); 51 L. D. 583 (1926); letter from Commissioner of the General Land Office to Vogelsang, Brown, Cram, Feeley and Finney, attorneys, dated September 4, 1940, approved by Assistant Secretary; letter of August 13, 1941, from the Commissioner of the General Land Office to George R. Wickham, attorney; and letter of June 1, 1943, from the Commissioner of the General Land Office to the Anderson-Prichard Oil Corporation.

The appellants rely on *State v. Worden*, 44 N. M. 400, 103 P. (2d) 124, and *Gypsy Oil Co. v. Cover*, 78 Okla. 158, 189 Pac. 540, in support of their position that production on the assigned portion of a lease continues the lease as to the unassigned portion. Both of these cases, however, may be distinguished on the ground that in neither case does it appear that a separate lease legal relationship between the lessor and the lessee and assignee had been established by valid regulation or agreement. The *Worden* case may be further distinguished on the ground that there the Court held that the lessor's own assignment form was used and this form failed to provide for the separate lease relationship, thus indicating a lack of intention on the lessor's part to establish such a relationship. 103 P. (2d) 127. In the instant case the lessee's assignment form was used, not the lessor's, and the clear intention of the United States to establish the separate lease relationship is present in the regulation (Circular 960). The *Gypsy Oil Co.* case is further distinguishable on the ground that only private parties were involved, hence no statutes or regulations entered into the consideration of the case.

The pronouncements of the text writers, relied on by the appellants (Summers, *Oil and Gas* (Permanent ed.), section 295; Thornton, *Oil and Gas* (5th ed.), section 338), are not in point since these merely state what they consider to be the general rule. The general rule, even if taken as stated by them, is not applicable in the instant case because of the Secretary's regulation specifically establishing the separate lease relationship between the United States and the lessors and assignees.

It is held, accordingly, that in the case of the Grier lease, and in the case of the Etz lease in the event of approval by the Secretary, the production of oil or gas in paying quantities on the assigned lands will not continue the lease as to the unassigned lands retained

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by the lessee during the period of such production. A separate discovery of oil or gas will have to be made on the unassigned lands on or prior to December 31, 1944, to continue the leases beyond their primary terms. The ruling of the Acting Commissioner is therefore *Affirmed.*

MOTION FOR REHEARING

C. W. Grier and George Etz have filed a motion for rehearing in the above cause in which the Department by its decision of May 12, 1944, affirmed the ruling rendered on October 29, 1943, by the Acting Commissioner of the General Land Office, insofar as it is applicable to oil and gas leases held by them. The ruling was to the effect that until an assignment of an oil and gas lease is approved, discovery inures to the benefit of the entire lease; that upon approval of an assignment by the Department, only the area assigned, containing a discovery well, is extended beyond the initial term while the remaining unassigned portion, lacking a discovery well, terminates; that an assignment, on approval, operates to segregate the listed lands under a separate lease; and that if by virtue of a discovery on the assigned portion of the lease the land in the unassigned portion is classified as being within a producing structure, the lease as to the unassigned portion will terminate at the end of the term for which it was issued and the lessee will not have a preference right to a new lease under the act of July 29, 1942 (56 Stat. 726).

Petitioners assign as grounds for their motion:

1. That the decision is based solely upon a regulation that is inconsistent with the "express and specific provisions" of the leases in question.

2. That the decision ignores or fails to consider points relied upon by appellants in the brief filed on their behalf in connection with their appeal from the General Land Office.

3. That the decision is of far-reaching effect and of much public concern and, if allowed to stand, will give the act of February 25, 1920 (41 Stat. 437), and amendments thereto, an unwarranted and inequitable construction which was not intended by Congress and which will lead to much confusion and expense in departmental administration of the act.

The second and third grounds are insufficient to support the motion. All points relied upon by appellants in their appeal were thoroughly considered by the Department, but in view of the ground upon which the decision was based, it was unnecessary to take up and answer specifically each point raised. These points included the one now assigned

as the third ground for petitioners' motion; it received careful consideration by the Department and raises no new issue here.

The first ground presents the only new contention. The substance of the argument is that the appellants are bound by the terms of their lease (sec. 2(m)) to conform only to reasonable regulations of the Secretary of the Interior which are "not inconsistent with any express and specific provisions" of the lease. They contend that the regulation of August 19, 1924 (Circ. 960), which formed the basis of the Department's decision, is inconsistent with express and specific provisions of their lease and that the regulation is, therefore, not controlling.

First, it is argued that the regulation was promulgated prior to the passage of the amendatory act of August 21, 1935 (49 Stat. 674), and was therefore applicable, and intended to be applicable, only to the old form of 20-year lease with preferential right of renewal and not to the type of lease in question, the production lease established by the 1935 act. It is true that the present form of lease was not in existence at the time the regulation was issued. However, in establishing the legal relationship between the United States and lessees and partial assignees, the regulation does not mention and was not made dependent upon any particular form of lease. It was aimed at defining the legal situation to prevail when there should be an assignment of a part of an area described in an oil and gas lease. It is immaterial therefore whether the lease is one for 20 years with preferential right of renewal or a 5- or 10-year lease extensible by production.

As for the contention that the regulation was not intended to apply to the present form of lease, reference need be made only to the fact that the rule therein expressed has been affirmed on several occasions since 1935. See the letters dated 1940, 1941, and 1943, cited in the Department's decision, p. 716.

Secondly, petitioners contend that the regulation would operate to restrict the lessees' power of assignment and that it is therefore contrary to the terms of section 2(p) of the lease which gives them such power. They cite the situation where a lessee whose lease has been extended by reason of production on one section of his leased lands wishes to assign his lease to undeveloped sections. The regulation would have the effect of terminating the lease as to those undeveloped sections upon the approval of the assignment. Therefore, it is argued that the lessee's right of assignment would be curtailed contrary to the provisions of section 2(p).

This argument seems to beg the question at issue. Section 2(p) authorizes assignments, but it provides that they may be made only

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with the consent of the Secretary. As pointed out in the Department's decision, this means that the Secretary may impose reasonable conditions in giving his consent. Since these conditions naturally qualify or limit the exercise of the assignment power, section 2(p) expressly recognizes that the power of assignment is not absolute. The question therefore is whether a condition imposed, in this case the regulation, is reasonable and not merely whether it will operate to restrict the exercise of the power. In arguing that the regulation is invalid solely because it limits the power of assignment, petitioners assume, without proving, that it is unreasonable and arbitrary.

Petitioners raise sundry other points in support of their motion, but these seem to be no more than elaborations of points previously urged by them on appeal. They therefore need not be discussed.

On behalf of petitioners, the Humble Oil and Refining Company and the Texas Company have filed *amicus curiae* briefs. They do not, however, present any new grounds for consideration but merely enlarge upon or repeat contentions already raised by petitioners.

Because neither the motion nor the *amicus curiae* briefs present any new grounds of substance for rehearing, the motion is

Denied.

AUTHORITY OF THE SECRETARY TO PARTITION RESTRICTED INDIAN LAND

Opinion, June 29, 1944

RESTRICTED INDIAN LAND—AUTHORITY OF SECRETARY TO PARTITION—ACT OF MAY 18, 1916.

The Secretary of the Interior may not partition land held under a restricted deed by virtue of the authority vested in him by the act of May 18, 1916 (39 Stat. 127, 25 U. S. C. sec. 378), which act authorizes him to partition inherited trust allotments.

RESTRICTED INDIAN LAND—PARTITION—EFFECT OF STATE COURT DECREE.

No partitioning of the Indian's restricted interest in land effected by a decree of a State court would be binding on the United States unless it were a party to the suit.

RESTRICTED INDIAN LAND—PARTITION—NON-INDIAN OWNER—LEGISLATIVE RELIEF.

A non-Indian owner of an undivided interest in restricted Indian land cannot make the United States a party to any suit brought for the purpose of partitioning lands held under a restricted deed.

Such a non-Indian owner's only remedy appears to be the enactment of legislation conferring upon some court jurisdiction to partition the land.

HARPER, Solicitor:

I am returning for your [Commissioner of Indian Affairs] further consideration the attached letter to Herbert K. Hyde, Esq., relating to the partition of the NE $\frac{1}{4}$ of section 33, township 9 North, Range 1 East, in Cleveland County, Oklahoma. The W $\frac{1}{2}$ of this quarter section was originally the allotment of William Phelps and the E $\frac{1}{2}$ thereof was the original allotment of John Phelps, both of whom were members of the Citizen Band of Potawatomi Indians.

Margaret Holmes, an heir to an undivided one-half interest in both tracts of land, conveyed her interest in both the E $\frac{1}{2}$ and the W $\frac{1}{2}$ of the NE $\frac{1}{4}$ to John H. Goodin, a white man, and John H. Goodin, legal guardian for John William Goodin, an Indian, heirs to the remaining undivided interest, by deed dated March 2, 1901. The deed was approved by the Department on May 20, 1901, subject to the restriction that any conveyance of the land must be approved by the Secretary of the Interior to pass valid title. The consideration for this conveyance was the conveyance by the Goodins of their undivided interests in other lands. The Secretary of the Interior was, of course, without authority to place any restrictions against the alienation of the one-fourth undivided interest which John H. Goodin acquired under the afore-mentioned deed and since John H. Goodin likewise acquired his original one-fourth undivided interest unrestricted it followed that his undivided one-half interest in the land was unrestricted from and after 1901.¹

John H. Goodin's unrestricted undivided interest is now claimed by B. H. Goodin, also a white man, subject to his mineral deed to one R. A. Heffner, covering a one-eighth interest in the W $\frac{1}{2}$ of the NE $\frac{1}{4}$ and a mortgage to one J. B. Webb, covering his undivided one-half interest in the W $\frac{1}{2}$ thereof. The remaining undivided one-half interest is still in Indian ownership and is still restricted against alienation without the approval of the Secretary of the Interior. It is now owned by Edith Fay Goodin Woodring, Thomas Goodin and J. R. Goodin.

On October 3, 1939, your Office submitted for approval two deeds, one from B. H. Goodin and his wife, Stella, conveying to the Indian owners their undivided interests in and to the E $\frac{1}{2}$ of the NE $\frac{1}{4}$ and the other from the Indian owners conveying to B. H. Goodin their undivided interests in the W $\frac{1}{2}$ thereof. These deeds, if approved, would have accomplished the partition of the lands. The exchange deeds were not approved at that time because of certain deficiencies shown by the abstract of title submitted with the deeds.²

¹ See *Levinthal Lead & Zinc Mining Co. v. Coleman*, 241 U. S. 432 (1916).

² See Solicitor's opinion M-30440, August 4, 1940.

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The deeds were resubmitted for approval on September 25, 1940, but by a memorandum of October 24, 1940, this office held that since the continuation of the abstract of title disclosed that the Secretary of the Interior had approved an oil and gas lease on the restricted interests in these lands and that the unrestricted interest had also been leased for oil and gas purposes, and further that a mineral deed to an undivided one-eighth interest in the oil and gas and other minerals on the $W\frac{1}{2}$ of the $NE\frac{1}{4}$ had been executed by B. H. Goodin and his wife, it would be necessary that the parties execute new deeds.

Trouble seems to have arisen between B. H. Goodin and the Indian heirs at about that time. The Indians have ever since consistently refused to execute new deeds or to do anything toward settling their controversy with B. H. Goodin or getting the lands partitioned.

On June 8, 1943, B. H. Goodin, through his attorney, Herbert K. Hyde, Esq., served notice on the United States District Attorney for the Western District of Oklahoma and on the Superintendent of the Shawnee Indian Agency that he had on May 13, 1943, commenced an action in the District Court of Cleveland County, Oklahoma, against the Indian owners for the partition of the lands. After the Superintendent called the suit to the attention of this Department, he was informed by your letter of August 4, 1943, that while the position of the Office of Indian Affairs ordinarily was that a State court was without jurisdiction over restricted Indian land, in view of the existing circumstances your Office was willing to waive the matter of jurisdiction and let the court proceed with the proposed partition proceedings with the understanding that the decree in partition would be subject to the approval of the Secretary of the Interior. It was suggested that the Superintendent so advise the United States Attorney. That letter was approved by the Department on September 10, 1943. Evidently the letter from the Department of Justice dated June 19, 1943, and transmitted to your Office on June 23, 1943, was overlooked. It is not with the present record. In that letter the Department of Justice pointed out that the State court did not have jurisdiction to partition the land and stated that the United States Attorney had been instructed to move to quash the service on him and the Superintendent and to move to dismiss on behalf of the restricted Indians, if the attorney for Goodin refused to dismiss the action voluntarily. Thereafter Goodin dismissed his suit in the State court.

On August 23, 1943, at the suggestion of the United States Attorney, Goodin petitioned the Secretary to partition the land "under and by virtue of the authority granted to the Secretary of the In-

terior under the act of May 18, 1916" (39 Stat. 127, 25 U. S. C. sec. 378).

In his petition, B. H. Goodin states that although he is the owner of an undivided one-half interest in the lands he is being entirely excluded therefrom and that he is receiving no income therefrom. He states further that he has no remedy in any court of competent jurisdiction and that he can secure no relief except through the proper action of the Secretary of the Interior.

On December 21, 1943, your Office advised the Superintendent:

* * * After carefully considering the matter and in view of the fact that the lands involved are not in a trust status but are held under restricted deeds, it has been determined that the lands cannot be partitioned by the issuance of a fee patent to the white man and a trust patent to the Indian heirs. The partition, if made by the Department will therefore have to be through the means of appropriate deeds executed by the parties involved. The only other alternative is to have the lands partitioned by appropriate court action as heretofore attempted by Mr. B. H. Goodin, the white man.

The Superintendent was instructed to call upon the Indians to execute a proper deed or to show cause why proper court action should not be instituted to partition the lands. On February 10, 1944, the Superintendent informed you that none of the Indians was willing to execute a new deed.

You now propose to inform Mr. Hyde that there will be no objection on the part of the Department to the bringing of an appropriate action in the State court to have the land partitioned. I do not agree that the Department should so inform Mr. Hyde. The Department's action of September 10, 1943, acquiescing in the partitioning of these lands by the State court was ill-advised. It was, however, based on the fact that the United States Attorney had been served with notice in this suit and the belief that he would take whatever action might be necessary to protect the interests of the United States and the Indians. The fact that the Attorney General had already instructed the United States Attorney to move to dismiss the suit was not brought to the attention of the Department at that time. The same mistake should not be repeated.

Obviously, as your Office recognizes, the State court has no jurisdiction over the restricted interest in this land.³ Any partitioning of the land effected by a decree of such a court would not be binding upon the United States and could be set aside by the United States unless it were a party to the suit.⁴ I know of no way in which Mr. Goodin could make the United States a party to any suit which he might bring to partition the lands.

³ Cohen, *Handbook of Federal Indian Law*, ch. 19, sec. 5.

⁴ *United States v. Hellard*, 322 U. S. 363.

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I agree with you that the lands may not be partitioned under the act of May 18, 1916, *supra*. That act authorizes the Secretary to partition inherited trust allotments and to issue patents in fee to competent heirs and trust patents to incompetent heirs. The Secretary may not issue a patent in fee or a trust patent for lands held under a restricted deed.

It seems inescapable, therefore, that Mr. Goodin has no remedy in the Department or in the courts for the situation in which he finds himself. The only possible source of relief open to Mr. Goodin appears to be the enactment of legislation conferring upon some court jurisdiction to partition these lands. In this connection your attention is called to the act of June 29, 1936 (49 Stat. 2368), validating certain conveyances of Kickapoo Indians in Oklahoma. Section 2 of that act conferred upon the United States District Court for the Western District of Oklahoma jurisdiction to hear and determine partition actions involving the lands specified in that act. If, as an administrative matter, you believe that the present involved ownership of the land warrants such a measure, it might be well for you to give consideration to the propriety of informing Mr. Hyde that the Department would have no objection to the enactment of a private law for the relief of his client.

AVAILABILITY OF PUEBLO COMPENSATION FUNDS FOR THE PURPOSE OF LOANS TO OTHER PUEBLOS

Opinion, July 7, 1944

STATUS AND POWERS OF INDIAN TRIBES—TRIBAL FUNDS—TRIBAL CONTRACTS.

The pueblos of New Mexico possess the requisite capacity to enter into binding contracts, the validity of which depend upon the legality of the object and the means of attaining that object. Under sections 5 and 7 of the act of June 18, 1934 (48 Stat. 984), the Secretary of the Interior may acquire lands for the Acoma and Laguna Pueblos and declare them to be Indian reservation lands, and such action is not in violation of the act of May 25, 1918 (40 Stat. 561, 570). The so-called compensation funds of the Picuris and Pojoaque Pueblos are available for any purpose considered of real benefit to the pueblo concerned, other than per capita payments, which are approved by the governing officials of the pueblos and the Commissioner of Indian Affairs. A loan of such funds to the Acoma and Laguna Pueblos to augment their present landholdings must be protected by adequate security and must return the lending pueblos the same or a greater rate of interest than the funds are now earning on deposit in the United States Treasury. The lands of the Acoma and Laguna Pueblos, whether now owned or hereafter acquired, are subject to the inhibitions on alienation or encumbrance found in section 4 of the 1934 act, *supra*.

HARPER, Solicitor:

In a memorandum of May 8 the Commissioner of Indian Affairs presented the question of whether the so-called compensation funds of the Picuris and Pojoaque Pueblos may be loaned to the Acoma and Laguna Pueblos for the purpose of enabling the borrowers to purchase certain patented lands and improvements within the Eleven Townships purchase area.

The Commissioner's memorandum recites none of the details of the proposal. There are several questions which naturally suggest themselves and which I believe would have to be answered before a definite opinion could be given as to the legality of the proposal. For example, there is no information at hand as to the arrangements contemplated for the repayment of the loans. The plans for repayment, including the promises to be made for the payment of interest and the pledging of property as security, would constitute integral parts of the loan transaction. In the absence of information as to these and other features of the proposal it is believed that it would be inadvisable to venture an opinion at this time on whether the loans can or cannot be made.

Whatever the details of the proposal may be, however, there are certain fundamental legal principles which would apply in any event. I will discuss these principles briefly below in the belief that such discussion may prove helpful in reaching the administrative conclusions which will be required.

The proposed loan transaction is, of course, a contractual one, and it is apparent that the action proposed by each party to the contract must rest upon legal authority. It is well settled that the pueblos of New Mexico have the status of separate legal entities, possessing the requisite capacity to enter into binding contracts.¹ In the final analysis, the contracts of the pueblos, as those of non-Indians, depend for their validity upon the legality of the object to be attained and the legality of the means of attainment employed by the contracting parties.

It is the object of the present proposal to augment the landholdings of the Acoma and Laguna Pueblos. The property and affairs of both of these pueblos are subject to the provisions of the act of June 18, 1934 (48 Stat. 984), section 5 of which specifically authorizes the Secretary of the Interior to acquire lands for the tribe. Under section 7 of that act the lands so acquired may be proclaimed to be Indian reservations. Action so taken by the Secretary under these specific authorizations is not in violation of the act of May 25, 1918

¹ Cohen, *Handbook of Federal Indian Law*, Ch. 14, sec. 5, and Ch. 20.

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(40 Stat. 561, 570), which prohibits additions to Indian reservations in the State of New Mexico "except by Act of Congress." Thus it is clear that the purpose of the proposed loans is a legal purpose, and that the borrowing pueblos may augment their present holdings through the purchase of lands. There remains for consideration the question of whether the compensation funds of the Picuris and Pojoaque Pueblos are available for the purpose of loans, and if they are so available, the further question of whether the Acoma and Laguna Pueblos are in a position to meet the conditions under which the funds are available.

In my memorandum of March 1, 1944, I held that the compensation funds of the Picuris and Pojoaque Pueblos were available for the purchase of lands to be thereafter leased to the Ramah Navajos provided it was administratively determined that the purchases were in fact being made for the benefit of the pueblos. That memorandum listed the several appropriation acts by which appropriations were made to the Picuris and Pojoaque Pueblos to compensate them for lands and water rights lost to them pursuant to the Pueblo Lands Act of June 7, 1924 (43 Stat. 636). It was shown that with the exception of one item of \$7,684.50 made available by the act of March 4, 1929 (45 Stat. 1562, 1569), for the purchase of a particular tract of land for the Picuris Pueblo the balance of the funds of both pueblos was continued available until expended by the acts of May 9, 1938 (52 Stat. 291, 299), and May 10, 1939 (53 Stat. 685, 694). These latter acts incorporated language which had first appeared in the act of August 9, 1937 (50 Stat. 571, 572), making the funds available not only for the original purposes, i. e., the reacquisition or replacement of properties lost pursuant to the 1924 act, but also "for such other purposes, except per capita payments, as may be recommended by the governing officials of the particular pueblos involved, and be approved by the Commissioner of Indian Affairs."

It is to be borne in mind that the compensation funds of the pueblos are not gratuities from the United States. As their name implies they are of a compensatory character, a *quid pro quo*, belonging to the pueblos and merely held in trust by the Government. Thus, while it appears from the comprehensive language of the appropriation acts, quoted above, that these funds are available for any purpose other than per capita payments, it would be a mistake to assume that there are no limitations on the use of the funds. The high degree of care imposed by the law on any fiduciary limits the Commissioner of Indian Affairs to the approval of those expenditures recommended

by the governing officials which result in a real benefit to the pueblo.² Whether a loan of these funds to other pueblos meets this standard depends upon whether a tangible advantage accrues to the lending pueblos. The moneys are now in the Treasury of the United States, drawing interest at the rate of 4 per cent per annum. This is the safest investment known to our Government, and I have no hesitancy, therefore, in expressing the opinion that any loan of these funds to other pueblos must be protected by adequate security and must return at least the same if not a greater rate of interest than the funds now earn. In view of the inhibitions contained in the act of June 18, 1934, *supra*, no lands of the Acoma or Laguna Pueblos, whether now owned or hereafter acquired, would be available for pledge as security for the loans. The ability of these pueblos to make and carry out a promise for the repayment of the substantial amount that would be involved, with interest, depends upon matters not in the record before me.

If it is found to be administratively feasible to proceed with the formulation of plans for the proposal within the limits of the fundamental principles mentioned above a complete outline of the proposal should be prepared and submitted by the Commissioner for review of the legal questions involved.

OWNERSHIP OF INVENTION MADE BY EMPLOYEE OF THE INTERIOR DEPARTMENT IN ACCOMPLISHING ASSIGNED TASK

Opinion, July 14, 1944

INVENTIONS BY EMPLOYEES—DEPARTMENTAL ORDER NO. 1763—RESEARCH OR INVESTIGATION—TIME OF INVENTION.

The invention of a safety valve by an employee of the Bureau of Mines whose duties include the designing of equipment in that field, and who was given the task of procuring such a valve because of his special qualifications, is within the general scope of the governmental duties of the employee, and as such is required to be assigned to the Government under departmental Order No. 1763. It is immaterial that the invention was conceived on the employee's own time.

² The following statement was submitted in justification of the language which broadened the scope of availability of the funds: "The wording of the text of this item as now written so restricts the use of these funds that requests of the governing officials of the pueblos for the purchase of farming equipment, and other articles of general benefit, to the pueblo as a whole must be denied. * * * These Indians, because of their well-established local government and their ability intelligently to handle their own problems, should be able to draw upon these funds for general purposes considered of real benefit to the individual groups." Page 895, Hearings, House Subcommittee of the Committee on Appropriations, Interior Department Appropriation Bill for 1938 (act of August 9, 1937, 50 Stat. 571).

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The drafting of working drawings and the reduction to practice on Government time, with Government facilities and financing, of an invention completely conceived on the inventor's own time, are such substantial steps in the making or development of the invention as to require the assignment of the invention to the Government under departmental Order No. 1763.

HARPER, *Solicitor*:

The Director of the Bureau of Mines has requested my opinion concerning the relative rights of the Government and Carl E. Baird, an employee of the Bureau of Mines, to an invention of an excess flow valve.

According to Mr. Baird's Invention Report, transmitted with the memorandum, the valve was invented in the following circumstances: Mr. Baird, an assistant mechanical engineer, was working in the Bureau of Mines helium plant at Amarillo, Texas, when the need arose for control valves in the high-pressure helium lines, capable of automatically shutting off the flow of gas when an excess amount of flow resulted from leakage, line breaks, or other causes. Apparently because of his employment as a sales and service engineer for a valve and meter manufacturer and his work on engineering problems in connection with excess flow valves for use in pipe line prior to his employment with the Bureau of Mines, C. W. Seibel, Supervising Engineer at the plant, assigned him the task of locating a source of supply of valves for use in a helium transmission line.

It would seem that Mr. Baird wrote to several valve and instrument companies to discover whether they had any valves suitable for the purpose desired, and found that no such valve was manufactured, before he began work on the invention upon which his claim is founded. However, his Invention Report, Paragraph No. 9,¹ is susceptible of another interpretation, i.e., that he made inquiries concerning a preconceived type of valve, only to find that no such valve was made. If the second interpretation is the correct one, the evidence points strongly to the fact that, at the time of the invention, Mr. Baird considered the design of the valve only as part of his regular engineering duties, just as drawing up specifications for any piece of equipment would be. For purposes of this opinion, however, it will be assumed that Mr. Baird did not give consideration to the invention or development of a new type of valve until he discovered the inadequacy of those regularly constructed by manufacturers, the interpretation which is most favorable to his belief that title to the invention belongs to him rather than to the Government.

¹ "The inventor was in contact with several valve and instrument companies prior to design of this excess flow valve; however, none of these manufacturers had any excess flow valves similar to the writer's design."

Mr. Baird states that the idea for the valve was conceived on July 8, 1943, on his own time. He says, and is supported in his statement by the memorandum from the Director, that the invention was, like Minerva sprung full-fledged from Jove's brow, complete from the moment of conception, being theoretically demonstrable by statement alone without further development. Nevertheless, no drawing of the valve was made on July 8 or at any time until Saturday, July 10, when a pencil sketch was made (presumably on Government time) and the invention discussed with Mr. Seibel and other employees of the Amarillo Helium Plant. When all the persons with whom Mr. Baird discussed his design for the valve agreed that it was workable, reduction to practice was begun at once by the helium plant, on Government time, with Government materials, using the helium plant's construction funds. The first valve was finished at the plant on August 3, 1943, and the first detailed drawing made on August 16, 1943.

As stated in his Invention Report, Mr. Baird's duties are "to make gas flow calculations, prescribe metering and automatic control equipment, perform engineering duties relating to the construction of gas pipelines, erection of gas processing equipment, checking on the strength of pressure vessels, assisting in the design and construction of buildings and framework for heavy pressure vessels, and similar engineering work."

The title to Mr. Baird's invention, as between him and the Government, depends upon whether the invention was made within the general scope of his governmental duties, as defined in section 2(a) of departmental Order No. 1763, dated November 17, 1942. Under one of the two criteria set up therein, an invention is considered to have been made within the general scope of the governmental duties of an employee "whenever his duties include research or investigation, * * * and the invention arose in the course of such research or investigation and is relevant to the general field of an inquiry to which the employee was assigned."

Mr. Baird's duties, according to his job sheet, include the performance of engineering duties relating to the construction of gas pipelines, assistance in the design and construction of buildings and framework for heavy pressure vessels, and similar engineering work. These duties contemplate new construction, and the meeting of new engineering problems as they are encountered. The fact that the words "research and investigation" are not used in the classification of his duties is immaterial, if in fact his duties did include the solution of engineering problems connected with construction. The application of known engineering and physical principles to ac-

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comply hitherto unknown but desired results constitutes invention, and such work was included in Mr. Baird's duties at the time of his invention. In this respect, Mr. Baird's duties differed from those of the radio engineer described in Opinion M. 33183, dated August 31, 1943 (not published), where any designing work contemplated was only in connection with the more efficient and economic operation of a studio already in existence.

As part of his duties, Mr. Baird was assigned the task of locating a valve that would satisfy a particular need. The choice of an individual who had formerly been employed by a valve manufacturing concern as an engineer is significant, as indicating that the assignment was actually to locate a valve already manufactured, if available, but if not, to design one. Although there may not have been, and probably was not, a specific assignment to invent, there was an assignment to produce, in some manner, a satisfactory valve. While pursuing this assignment, Mr. Baird conceived his invention. It may therefore reasonably be said that the invention arose in the course of research or investigation within his duties and relevant to the general field of an inquiry to which he was assigned.

Order No. 1763 differs from, and is intended to modify, the general rule concerning Government employees established by the Supreme Court in *United States v. Dubilier Condenser Corporation*, 289 U. S. 178 (1933), by making a specific assignment to invent unnecessary before title to an employee's invention belongs to the Government. The object of the order being to secure for the people of the United States the full benefits of Government research and investigation in the Department of the Interior, it can only be accomplished if an assignment is required whenever an invention arises in the course of duties to which the employee is assigned, no matter how those duties are described in the employee's classification sheet.

Since the invention of the valve comes within the first of the criteria established by section 2(a) of Order No. 1763, it is immaterial that the conception may have occurred during the inventor's leisure hours.

* * * having agreed in advance that he would investigate for the benefit of the United States a suggestion of his superior officers, he cannot evade his obligation by developing it while on leave. [*United States v. Houghton*, 20 F. (2d) 434, 439 (1927), affirmed 23 F. (2d) 386 (1928).]

We do not consider the claim made by Byerlein that he developed this patentable idea at nights as of the slightest importance. His salary was paid either for the year or for the month. Certainly under the written contract it would make no difference what time in the day or night such ideas were developed. [*Toledo Machine & Tool Co. v. Byerlein*, 9 F. (2d) 279, 281 (1925).]

The title to Mr. Baird's invention is required to be assigned to the Government, not only under the first criterion established by Order No. 1763, but also under the second, defining an invention as within the general scope of an employee's duties if it was in substantial degree made or developed through the use of Government facilities or financing, on Government time, or through the aid of Government information not available to the public. Mr. Baird's excess flow valve, except for the conception of the original idea, was made and developed on Government time, with Government facilities, and with Government financing. The first sketch was made at the Amarillo Helium Plant and the first disclosure to witnesses was to fellow employees at the plant. The valve was reduced to practice in the plant's workshops and detailed drawings were made there. Although it is not stated that the original idea or plans were modified in any way during this process, it is improbable that no changes were made between the stage of mental conception and the finished final form of the valve. As pointed out in the opinion of March 31, 1943, 58 I. D. 374, *supra*, following a long line of Supreme Court decisions, an invention is not made until it has passed beyond the stage of mental conception and imperfect experiments and is represented in some physical form, of which the minimum requirement is a working drawing or model. "A conception of the mind is not an invention until represented in some physical form. * * *" *Clark Thread Co. v. Willimantic Linen Co.*, 140 U. S. 481, 489 (1891).

Nor is an invention considered as "made," as defined by the order, until there has been some demonstrable overt action on the part of the inventor establishing the fact of the invention, such as disclosure either orally or in writing, or the preparation of working drawings or a model. Therefore, no matter how complete the inventor's conception reached at his leisure, the invention was actually made and developed on the Government's time, with its facilities and financing.

Mr. Baird attempts to bring his invention within the facts of Opinion M. 33183, *supra*, wherein it was held that, since the conception was mathematically and theoretically demonstrable by statement alone, construction of a model on Government time did not require an assignment to the Government. The facts are distinguishable, however, in at least one respect other than the difference between the duties of the inventors pointed out above. In that case, the working drawing essential to the "making" even of an invention complete from conception was finished at home and not on Government time, whereas, here, the invention had not progressed beyond conception before work was begun on it at the helium plant.

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Therefore, since the invention not only arose in the course of duties assigned to Mr. Baird, but was actually "made" and "developed" on Government time, with Government facilities and financing, as disclosed by the statements in the Invention Report, Mr. Baird is required to assign his invention to the Government, as represented by the Secretary of the Interior. If upon a fuller statement of facts there is sufficient evidence to support the conclusion of the Director of the Bureau of Mines that the inventor is entitled to commercial rights to his invention, I shall be glad to revise my opinion. [See *infra*, p. 738.]

Approved:

MICHAEL W. STRAUS,
Assistant Secretary.

**RIGHT OF THE UNITED STATES TO INVENTION COMPLETED BY
EMPLOYEES OF THE INTERIOR DEPARTMENT AFTER NOVEM-
BER 17, 1942**

Opinion, July 14, 1944

DEPARTMENTAL ORDER NO. 1763—TIME OF INVENTION—EMPLOYMENT TO INVENT—
DISPOSITION OF GOVERNMENT PROPERTY—DEVELOPMENT OF INVENTION.

An employee of the Geological Survey required to pursue and direct research in the development of new methods and devices in a particular field is employed to make an invention within the terms of *United States v. Dubilier Condenser Corporation*, 289 U. S. 178 (1933), and so is any employee assigned to work with him in connection with his experimentation.

An invention made as a result of an assignment to invent belongs to the Government, and the inventor may not retain commercial rights thereto.

An invention substantially developed on Government time, with Government facilities and financing after November 17, 1942, the effective date of departmental Order No. 1763, is required to be assigned to the Government even though it was conceived before that date outside the general scope of the inventors' governmental duties.

HARPER, *Solicitor*:

My opinion has been requested, pursuant to departmental Order No. 1871 of September 7, 1943, regarding the relative rights of the Government and two employees of the Geological Survey, J. L. Buckmaster and J. G. Lewis, to an invention called a "Stereoblique Plotter."

As described in the invention report submitted by the two inventors, the Stereoblique Plotter is an instrument designed for drawing planimetric maps directly from overlapping oblique photographs. The inventors state that they conceived the original idea on June

22, 1942, and made a schematic diagram demonstrating the basic principles underlying the invention on June 27, 1942. The sketch is unwitnessed and has no identifying date except that written on it by the inventors. No disclosure to others was made at the time. Thereafter the instrument was developed in the Geological Survey, approximately a year being consumed in the development. A first model was successfully operated on May 29, 1943, and a second and improved model on November 11, 1943.

Assuming that the invention was complete on June 27, 1942, and therefore was conceived and "made," as that word is used in departmental Order No. 1763 [58 I. D. 374], before November 17, 1942, the effective date of the order, the relative rights of the employee-inventors and the Government must be decided under the general law as pronounced by the courts.

According to these decisions, applying both to private industry and Government service, the factor determinative of title to an invention, when there is no express contract to assign to the employer, is the nature of the employment. As stated by the Supreme Court in *United States v. Dubilier Condenser Corporation*, 289 U. S. 178, 187 (1933):

One employed to make an invention, who succeeds, during his term of service, in accomplishing that task, is bound to assign to his employer any patent obtained. The reason is that he has only produced that which he was employed to invent. His invention is the precise subject of the contract of employment. A term of the agreement necessarily is that what he is paid to produce belongs to his paymaster. *Standard Parts Co. v. Peck*, 264 U. S. 52. On the other hand, if the employment be general, albeit it cover a field of labor and effort in the performance of which the employee conceived the invention for which he obtained a patent, the contract is not so broadly construed as to require an assignment of the patent. *Hapgood v. Hewitt*, 119 U. S. 226; *Dalzell v. Dueber Watch Case Mfg. Co.*, 149 U. S. 315.

The two cases cited by the Court as illustrative of general employment were both cases where the inventor was in charge of the employer's works and apparently had discretion to devise and make improvements in articles manufactured as well as in methods of manufacturing them. It is true that the invention in controversy in *Hapgood v. Hewitt* was developed while he was engaged in designing an iron frame to substitute for the wooden frame formerly used on a sulky plow at the direction of the employer's officers, but it does not appear that his employment necessarily contemplated invention, or that the plow itself was patented.

The Court in the *Dubilier* case explains the difference in the following manner:

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Though the mental concept is embodied or realized in a mechanism or a physical or chemical aggregate, the embodiment is not the invention and is not the subject of a patent. This distinction between the idea and its application in practice is the basis of the rule that employment merely to design or to construct or to devise methods of manufacture is not the same as employment to invent. [289 U. S. 178, 188.]

Nor, according to the Court, is research necessarily the same as invention. The basis for the decision of the lower courts (49 F. (2d) 306; 59 F. (2d) 381), approved by the Supreme Court, was an express finding that the inventors, employees of the Bureau of Standards, were employed to do research work only, and that invention was not within the scope of their employment. The Supreme Court also rests its holding in part upon the fact that the inventions were in the field of radio reception, whereas the work to which the inventors were assigned was in the field of airplane radio.

Cases where the courts have held that inventions were developed under employment to invent, in addition to *Standard Parts Co. v. Peck*, *supra*, are *St. Louis & O'Fallon Coal Co. v. Dinwiddie*, 53 F. (2d) 655; *Dinwiddie v. St. Louis & O'Fallon Coal Co.*, 64 F. (2d) 303; *Houghton v. United States*, 23 F. (2d) 386 (*aff'g* 20 F. (2d) 434, *cert. denied* 277 U. S. 592 (1928)); *Goodyear Tire & Rubber Co. v. Miller*, 22 F. (2d) 353.

In *St. Louis & O'Fallon Coal Co. v. Dinwiddie*, *supra*, the inventors were employed to conduct tests for the purpose of determining the commercial possibilities arising from certain patented processes for the low-temperature distillation of coals, which the patentees were under contract to assign to the employer if found suitable by the inventors. While these processes were being tested, the patented inventions, making use of the processes, were discovered. In holding that the inventions belonged to the employer, the Court said:

Surely an agreement to devote one's scientific knowledge and skill to a determination of whether a given article or process is commercially valuable, and to develop it to that end, impliedly includes an agreement to explain and to correct, if possible, its deficiencies, if any, in this respect. Conclusions without sound reasons in support of them are of little value in any realm of human activity. And so it is with improvements upon existing examples of inventive genius. Such improvements are but the tangible embodiment of the reasons for the advance in the given art. [53 F. (2d) 655, 663]

The court disposed of the claim that the agreement of the inventors was different from that of the original patentees with respect to their liability to assign inventions in the following words:

* * * clearly these defendants, who were operating by virtue of, and with full knowledge of, the terms of the agreement with the Kerns, and were working with them to the same common end—all at the sole expense of the plaintiff

—cannot be permitted successfully to assert, in the absence of proof of a very definite contrary agreement, that nevertheless they stand in a more preferred position with respect to what they themselves may have discovered in the course of a common enterprise, and may by such preference defeat the very object which they agreed to assist in attaining, and for which they accepted full compensation.

In *Houghton v. United States, supra*, the court decided that a Government employee is employed to invent if he is actually assigned to making an invention at the time he makes the discovery, without respect to the terms of the original contract of hiring. The opinion uses the following strong language:

It is contended * * * that defendant was not employed by the government as an inventor, or to invent the fumigant gas which is the subject of the patent, but merely to do ordinary work as a chemist, such as the analyzing of dust samples. The trouble with this argument is that it gives too narrow a meaning to the word "employed." The right of the employer to the invention or discovery of the employee depends, not upon the terms of the original contract of hiring, but upon the nature of the service in which the employee is engaged at the time he makes the discovery or invention, and arises, not out of the terms of the contract of hiring, but out of the duty which the employee owes to his employer with respect to the service in which he is engaged. It matters not in what capacity the employee may originally have been hired, if he be set to experimenting with the view of making an invention, and accepts pay for such work, it is his duty to disclose to his employer what he discovers in making the experiments, and what he accomplishes by the experiments belongs to the employer. During the period that he is so engaged, he is "employed to invent," and the results of his efforts at invention belong to his employer in the same way as would the product of his efforts in any other direction. [23 F. (2d) 386, 390]

Although the *Dubilier* case was decided after these cases, it does not change the rulings made therein, since the *Dubilier* case is entirely distinguishable on the facts, the inventions clearly having been made apart from the duties assigned the inventors. If the inventions had been made as a result of assigned duties, there is little doubt that the Supreme Court would have followed the dictum in the case of *Solomons v. United States*, 137 U. S. 342, 346 (1890) (cited by the Court in another connection):

If one is employed to devise or perfect an instrument, or a means for accomplishing a prescribed result, he cannot, after successfully accomplishing the work for which he was employed, plead title thereto as against his employer. That which he has been employed and paid to accomplish becomes, when accomplished, the property of his employer. Whatever rights as an individual he may have had in and to his inventive powers, and that which they are able to accomplish, he has sold in advance to his employer.

The official duties of J. L. Buckmaster throughout the period from conception of the Stereoblique Plotter to its final reduction to prac-

July 14, 1944

tice, as described in his job classification sheet, were under general supervision but with considerable latitude for independent action and decision to pursue and direct research required in the development of new methods and devices used in unique photogrammetric activities involved in the compilation of aerial photographs and to train new employees in the theory and general routine of such a program. He was actually engaged in such work at the time of the invention. There is thus no doubt that he was employed to invent such devices as he actually invented. The fact that the word "invent" is not used in his job description is immaterial, in view of the fact that the job description specifically calls for the development of *new* methods and devices. Thus the facts differ from those found by the Court in the *Dubilier* case, where it was held that the research which the inventors were employed to engage in did not contemplate invention.

The case, in so far as J. G. Lewis is concerned, is somewhat closer. At the time of the conception of the invention and throughout the period of development, his duties, according to his job classification sheet, did not include invention or even research or investigation. The job description assigning to him such duties contained in the invention report was not effective until January 31, 1944, and, accordingly, cannot be used as the basis for any conclusions as to his duties when the invention was made. Therefore, if Mr. Lewis' duties at the time of the invention included new discoveries, it was by reason of specific assignments from his superiors rather than by the establishment of a position *per se* contemplating invention. Such an assignment, however, can be inferred from the fact that he was working with his supervisor, Mr. Buckmaster, on an invention in the field of his regular duties, and that Mr. Buckmaster was authorized to "pursue and direct research" in that field. As stated in *St. Louis & O'Fallon Coal Co. v. Dinwiddie, supra*, Mr. Lewis cannot claim that he stands in a more preferred position than his supervisor, who was clearly assigned to invent. Nor can he, after accepting compensation for his inventive work under a specific assignment, claim that he was not employed as an inventor, according to *Houghton v. United States, supra*.

Therefore, since the inventors were employed to make an invention, and actually did make such an invention, equitable title thereto belongs to the United States. Whether, in view of this fact, the Department may legally permit the inventors to retain commercial rights to the invention is doubtful. As stated by the court in *Houghton v. United States*:

Upon the principles heretofore discussed, it [the invention] was the property of the government. No official of the government was authorized to give away any interest in it, and no subsequent recognition of a right in defendant, not even a conveyance to defendant, could have conferred any right upon him or been binding upon the government. [23 F. (2d) 386, 391]

The opinion in the *Dubilier* case does not contradict this statement of the Circuit Court, since the Supreme Court cites numerous cases where employees of the Bureau of Standards were allowed to retain title to their inventions only as evidence that they were not employed to invent. In fact, the Court recognized that if the defendants had been employed to invent, the Government would have had equitable title to the patents granted the inventors.

The conclusion that employees who have made inventions as part of their duties may not be allowed to retain title to those inventions seems inevitable in view of Revised Statutes sec. 1765, 5 U. S. C. sec. 70, providing as follows:

No officer in any branch of the public service, or any other person whose salary, pay, or emoluments are fixed by law or regulations, shall receive any additional pay, extra allowance, or compensation, in any form whatever * * * for any * * * service or duty whatever, unless the same is authorized by law, and the appropriation therefor explicitly states that it is for such additional pay, extra allowance, or compensation.

There seems to be little doubt that permission to retain or take title to Government property would be extra compensation. In view of the prohibition against extra compensation and the lack of authority in the Department to dispose of Government property except as provided by law, it does not appear that the Department may legally permit Messrs. Buckmaster and Lewis to retain title to their inventions. This opinion does not conflict with the past practice of the Department in permitting inventors to retain commercial rights to their inventions, since in no previous case that has come to my attention did the facts presented so clearly show employment to invent as in the instant case.

My conclusion that the invention belongs to the Government of the United States instead of to the inventors may be supported on another ground. The invention report shows that the invention was not completed in its final form before November 11, 1943, and that the period of development lasted approximately a year. Assuming that the development period began immediately after June 22, 1942, nevertheless it was in substantial degree made or developed through the use of Government facilities and financing, and on Government time after November 17, 1942, and accordingly within the scope of the inventors' governmental duties, as defined by Order No. 1763. Accordingly, even if the conception of the invention was not in the

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course of the inventors' assigned duties, the invention is required to be assigned to the Government because it was developed within the scope of their duties after the effective date of the order.

Approved:

MICHAEL W. STRAUS,
Assistant Secretary.

DELEGATION OF AUTHORITY OF SECRETARY TO COMMISSIONER OF INDIAN AFFAIRS

Opinion, August 31, 1944

OSAGE STATUTE—APPROVAL OF APPLICATIONS BY OSAGE ALLOTTEES.

The Secretary may delegate to the Commissioner of Indian Affairs the function of approving applications under the provisions of section 5 of the act of April 18, 1912.

HARPER, *Solicitor*:

This is in reply to your [Assistant Secretary] memorandum of July 8 in which you requested this office to consider the question of whether the function of approving applications under the provisions of section 5 of the act of Congress approved April 18, 1912 (37 Stat. 87), can legally be delegated to the Commissioner of Indian Affairs. That section provides as follows:

That the Secretary of the Interior, in his discretion, hereby is authorized, under rules and regulations to be prescribed by him and upon application therefor, to pay to Osage allottees, including the blind, insane, crippled, aged, or helpless, all or part of the funds in the Treasury of the United States to their individual credit: *Provided*, That he shall be first satisfied of the competency of the allottee or that the release of said individual trust funds would be to the manifest best interests and welfare of the allottee: *Provided further*, That no trust funds of a minor or a person above mentioned who is incompetent shall be released and paid over except to a guardian of such person duly appointed by the proper court and after the filing by such guardian and approval by the court of a sufficient bond conditioned to faithfully administer the funds released and the avails thereof.

It is my opinion that this function can be delegated to the Commissioner of Indian Affairs pursuant to the provisions of the above section.

In accordance with the principles regarding the legality of delegating functions discussed in the memoranda of this office of August 26, 1943, and June 16, 1944, it is clear that the duty of approving applications by Osage Indians for moneys in the Treasury of the United States belonging to the applicant is one which the Secretary

may delegate pursuant to the broad authority of sections 161 and 463 of the Revised Statutes. This duty does not involve the formulation of basic policies but merely constitutes a routine matter for which a standard form is employed. It does involve the exercise of discretion but as pointed out in the above-mentioned opinions, the head of a department may delegate such duties, once precedents have been established.

There is no evidence in the legislative history of this statute which compels the conclusion that Congress intended that the Secretary's power to pass on these applications should be exercised personally. In fact the meager discussion of this section of the statute indicates a contrary intention (62d Cong., 2d sess., 48 Cong. Rec., Part 5, p. 4258, *et seq.*). The statute itself prescribes the standards insofar as the eligibility of allottees is concerned. It obviously was intended that the phrase "to pay" as used therein should be interpreted as "shall cause to be paid." The Supreme Court so interpreted a similar provision involved in the case of *Work v. United States ex rel. Lynn*, 266 U. S. 161. It may also be noted in the language of the section that the Secretary is authorized to perform this duty "under rules and regulations to be prescribed by him," which indicates a recognition that the duty might be delegated. These indications, of course, are not determinative in themselves but constitute an additional factor in deciding the question. In the absence of a clear indication of a different congressional intent, this factor, together with the nature of the duty, justifies the conclusion that personal action was not contemplated. Accordingly, I believe that this authority may be delegated by the Secretary to the Commissioner of Indian Affairs.

It is suggested that provision be made for an opportunity to appeal to the Secretary from the Commissioner's determination.

INTERPRETATION OF "RESEARCH OR INVESTIGATION" WITHIN THE MEANING OF ORDER NO. 1763

Opinion On Reconsideration, September 19, 1944

PATENTS—REQUEST FOR RECONSIDERATION—TYPES OF ACTIVITY INCLUDED IN "RESEARCH OR INVESTIGATION" UNDER ORDER NO. 1763—DUTIES OF EMPLOYEE.

An employee is engaged in "research or investigation," as used in departmental Order No. 1763 of November 17, 1942, if his duties include the study of principles of a subject with a view to increasing the field of knowledge or of discovering practical applications of the principles; or if he is assigned to the solution of a practical problem where known solutions are unsatisfactory in such circumstances that good craftsmanship or professional competence would require him to engage in research or investigation in an attempt to reach an adequate solution.

September 19, 1944

An engineer assigned to procure a particular type of valve, where none is in existence and substitutes are unsatisfactory, is assigned to engage in "research or investigation" within the meaning of Order No. 1763.

An invention made pursuant to a specific assignment calling for research or investigation, in the course of research or investigation and relevant to the general field of the assigned inquiry, is assignable to the Government under departmental Order No. 1763.

HARPER, *Solicitor*:

My reconsideration has been requested by the Director of the Bureau of Mines relative to my opinion of July 14 [58 I. D. 726] that the invention by Carl E. Baird of an excess-flow valve was within the general scope of Mr. Baird's governmental duties and assignable to the Government. The opinion was based on two grounds, either of which would have reached the same result: (1) that Mr. Baird's duties included research and investigation, and the invention arose in the course of such research and investigation and was relevant to the general field of an inquiry to which he was assigned; (2) that the invention was substantially made and developed on Government time, with Government facilities and financing.

The request for reconsideration is accompanied by a memorandum dated August 10 from Mr. Baird's supervisor, C. W. Seibel, containing further information as to the circumstances surrounding the making of the invention and stating the supervisor's conclusion, concurred in by the Director of the Bureau of Mines, that the invention was not within the general scope of Mr. Baird's duties under departmental Order No. 1763 of November 17, 1942.

Mr. Seibel states that none of the duties set forth in Mr. Baird's job description involves invention. Under the rule stated in *United States v. Dubilier Condenser Corporation*, 289 U. S. 178 (1933), applicable to inventions by employees of the Department before the issuance of Order No. 1763, the fact that an employee was not assigned to invent would have been conclusive of his right to the invention as opposed to any claim by the Government. But Order No. 1763 changed that rule by making it a condition of employment in the Department that any invention be assigned to the Government if the employee's duties include, not invention, but research or investigation, and the invention arose in the course of such research or investigation and was relevant to the general field of an inquiry to which the employee was assigned.

It is not possible to foresee all of the activities which may be included in the words "research or investigation" since they will vary in accordance with circumstances, but in order to correct some misconceptions which may have arisen as to the meaning of the words,

I shall set forth some of the types of activities which have been held in previous opinions to involve research or investigation.

1. If an employee's duties, either as described in his job sheet or as assigned to him by his supervisors, include the study of principles of a subject with the view to increasing the field of knowledge or of discovering practical applications of the principles, the employee is engaged in research or investigation.

2. If an employee's duties, either as described in his job sheet or as assigned by his supervisors, involve the application of known principles to practical problems and such existing solutions as may be known to the employee are unsatisfactory, and if in these circumstances good craftsmanship and professional competence require the employee to engage in research or investigation in an attempt to reach an adequate solution, an employee given such an assignment is considered to be engaged in research or investigation.

The fact that Mr. Baird was engaged in this second type of research and investigatory activity was recognized in my July 14 opinion in the following words:

The fact that the words "research and investigation" are not used in the classification of his duties is immaterial, if in fact his duties did include the solution of engineering problems connected with construction. The application of known engineering and physical principles to accomplish hitherto unknown but desired results constitutes invention, and such work was included in Mr. Baird's duties at the time of his invention.

In commenting on Mr. Baird's duties in his memorandum of August 10, Mr. Seibel makes the following statements:

Primarily, Mr. Baird was engaged in the selection and purchasing of pipe, valves, and fittings for the construction of the various helium plants. His training and his familiarity with standard pieces of equipment used in gas practice were the qualifications on which the job was awarded. As an example of Mr. Baird's duties, he would investigate available standard valves best suited to perform some specific purpose, would make a selection and where necessary would pass judgment on the suitability of available substitutes. * * *

During the course of selecting and purchasing various pieces of equipment which went into the construction of the Bureau of Mines helium plants, Mr. Baird was requested by the writer to see if he could find a standard valve which would be suitable for installation in the 90-mile pipeline which was contemplated between Gallup and Shiprock, N. Mex. * * * A standard valve was desired which would automatically close in the event the pipeline should break, and prevent loss of all of the helium in the pipeline.

Mr. Baird made a search of standard valve catalogs and reported to the writer that he was unable to find a standard valve which would perform the service required.

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This did not end Mr. Baird's assignment to procure a valve, however, for when it was apparent that no standard valve would meet Mr. Seibel's requirements for an automatic valve—

Mr. Baird was instructed to procure standard valves without the desired but unobtainable automatic feature for installation in the pipe line at regular intervals. It was hoped that if the pipe line should burst, these valves could be closed manually and at least some of the helium prevented from escaping.

The routine testing of valves to determine whether or not they were satisfactory for the desired purpose did not require or involve research or investigation. However, when it became apparent that there was no known automatic method for closing the pipe line and the known manual methods were unsatisfactory because of the loss of large amounts of helium gas, it was incumbent upon Mr. Baird, as an experienced engineer in the field of valve and gas-line construction, to engage in research and investigation to determine whether he could devise a satisfactory automatic valve. In other words, the existence of the unsolved problem of an automatic method of shutting off the helium pipe lines converted Mr. Baird's apparently routine assignment of procuring a valve into a task involving research and investigation. The fact that Mr. Seibel did not in specific words request Mr. Baird to invent an automatic valve and would have accepted the furnishing of a less satisfactory valve as a performance of Mr. Baird's assignment did not relieve Mr. Baird of the obligation of engaging in research or investigation in an attempt to bring his assignment to a successful conclusion.

Once it has been determined that Mr. Baird's assignment called for investigation and research, it follows irresistibly that the invention arose in the course of his investigation and research and was relevant to the general field of an inquiry to which he was assigned.

In view of this analysis of Mr. Baird's duties, the additional information furnished by Mr. Seibel does not change my previously expressed conclusions that the invention was made within the general scope of Mr. Baird's governmental duties of research and investigation and must be assigned to the Government. It is unnecessary to discuss further the question as to whether the invention was substantially made or developed on Government time, with Government facilities or financing, since the relative rights of Mr. Baird and the Government are disposed of on the grounds discussed above.

Approved:

MICHAEL W. STRAUS,

Assistant Secretary.

GOVERNMENT RIGHT TO INVENTION NOT RELATED TO EMPLOYEES' ASSIGNMENT

Opinion, September 20, 1944

PATENTS—DEPARTMENTAL ORDER NO. 1763—GENERAL SCOPE OF INVENTORS' GOVERNMENTAL DUTIES—FUNCTIONS OF RADIO SECTION—PUBLIC INTEREST.

The invention of "a system of sound recording and reproduction and/or a dynamic range control for radio broadcasting" by employees of the Department's Radio-Television Section did not arise in the course of, and was not related to the general field of assigned research or investigation, because the Department's radio studio is operational rather than experimental, and any research required of the employees was confined to planning, designing or altering its equipment and studying questions connected with particular programs.

An invention made by employees of the Interior Department which is not related to research or investigation within the general field of their assignments, on their own time, without Government facilities or financing, and without the aid of information not available to the public, is not covered by departmental Order No. 1763 of November 17, 1942, requiring all inventions made by employees within the general scope of their governmental duties to be assigned to the Government.

A showing that an invention may be used by the Government is a sufficient showing of public interest for a certificate to that effect to be signed enabling the inventors to file their patent application without the payment of fees under the act of March 3, 1883, as amended (35 U. S. C. sec. 45).

HARPER, *Solicitor*:

There has been submitted for my consideration by the Director of Information the report of an invention described as "a system of sound recording and reproduction and/or a dynamic range control for radio broadcasting." The inventors are stated to be David Shannon Allen, Director, Radio-Television Section, and Henry Peter Meisinger, Engineer in Charge of the Section. Since the invention was conceived on January 11, 1944, the relative rights of the Government and the inventors to ownership and control of the invention must be determined under departmental Order No. 1763, dated November 17, 1942.

The invention report states that while walking home from work on January 11, 1944, Mr. Allen conceived the idea of cutting two simultaneously made grooves, instead of one, when making a recording. When such a recording was played back, one groove could carry the weight of the pick-up assembly, leaving the modulated groove free to move, without any other pressures, the play-back needle. When he mentioned the idea to Mr. Meisinger on January 13, Mr. Meisinger suggested the modulation of the extra groove with an amplitude control, substantially improving the original idea. The other develop-

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ments and uses conceived stem from these two original ideas. The invention report does not identify the time or the place of the conversation between Messrs. Allen and Meisinger, or indicate when subsequent work on the invention was performed, but states that the invention was not made or developed during working hours. Since there is no evidence to the contrary, and since the Director of Information by his memorandum of transmittal substantiates the statement, it must be assumed that the invention was not substantially made or developed on Government time. Inasmuch as the invention has not been reduced to practice and no model has been made, the invention was not made or developed through Government finances or facilities. Nor did the inventors make use of any information that would not be available to radio technicians anywhere.

As the invention was not substantially made or developed through the use of Government facilities or financing, on Government time, or through the aid of Government information not available to the public, it is not required to be assigned to the Government under Order No. 1763 unless the duties of the inventors include research or investigation, or the supervision of research or investigation, and the invention arose in the scope of such research or investigation and is relevant to the general field of an inquiry to which the inventors were assigned.

The only portion of Mr. Meisinger's duties which has any bearing upon this question is a general assignment to spend 20 per cent of his time on the planning, designing, and altering of equipment for the studio. Any research or investigation which Mr. Meisinger may have been required to conduct was in connection with the efficient operation of the studio. He was not assigned or expected to do any work on his own initiative with a view to improving the techniques of sound recording or broadcasting generally. The ideas which he contributed to Mr. Allen's original conception did not arise in the course of any research or investigation to which he was assigned and were not relevant to the field of any of his assignments. Therefore, insofar as Mr. Meisinger is concerned, the invention is not covered by Order No. 1763, and is not required to be assigned to the Government.

The scope of Mr. Allen's duties is best described by Michael W. Straus, then Director of Information, on page 14 of the Hearings before the Subcommittee of the House Appropriations Committee on the Interior Department Appropriation Bill for 1942:

He has to make arrangements for the time, review the technical form of the program, aid in the research, and consult with the script writer who writes the program. He also manages the mechanical facilities of the Department of the Interior radio studio—it is not a station, merely a studio which can be

hooked to any network—which is used by all agencies of Government on a service basis.”

It is apparent from this description that whatever original research or investigation Mr. Allen may engage in does not relate to radio or sound-recording equipment, and that his duties are primarily literary and administrative. Although Mr. Straus used the word “research” in describing Mr. Allen’s duties with respect to radio programs, it is clear from the context that the research involved is directed toward the subject matter of the programs rather than to the technical problems of radio or sound engineering. Nor does Mr. Allen’s supervision of Mr. Meisinger’s work of planning, designing and altering equipment for the studio include the supervision of research or investigation related to the invention in question, if, as stated above, the invention arose outside the course of Mr. Meisinger’s assigned work. Mr. Allen’s job classification sheet describes additional duties imposed upon Mr. Allen by the war, such as consultation with other agencies concerning radio policies and utilization of the studio, but it does not change the character of his duties, as they were summarized by Mr. Straus in 1941, so as to include general scientific research or investigation among them.

The view that neither Mr. Allen nor Mr. Meisinger is engaged in research or investigation, or the supervision of research or investigation, intended to improve the techniques of sound recording or broadcasting generally, so as to bring the invention within the coverage of Order No. 1763, is confirmed by a statement made by Mr. Straus on July 22, 1938, upon the policies of the Radio Section, the relevant portions of which are as follows:

1. The function of the Radio Section of the Department of the Interior, Division of Information, shall consist of bringing together, preparing, interpreting, and disseminating through the medium of radio, useful, informational, and educational material developed by the economic research, service, and conservation programs of the Department of the Interior.

* * * * *

3. The Radio Section shall be responsible for the operation of the radio studios in the Department building and shall develop and aid the utilization of those studios. The facilities of these studios and the radio section shall be available as feasible to all government agencies desiring to utilize them upon a reimbursable basis.

* * * * *

5. The Radio Section shall be headed by a director or acting director who is to be responsible to the Secretary of the Interior, through the Director of Information or otherwise for correct interpretation and presentation to the public of the Department’s activities.

These functions are indicative of an operational and not an experimental radio studio, a studio in which assigned research or investiga-

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tion is confined to the improvement of existing or available facilities, and not the development of an entirely new principle in recording or broadcasting.

Since neither Mr. Allen nor Mr. Meisinger is engaged in research or investigation relating to their invention, and the invention was not made or developed on Government time, with Government facilities or financing or with the aid of information not available to the public, the invention is not covered by departmental Order No. 1763 and is not required to be assigned to the Government.

The inventors have made a sufficient showing that the invention is liable to be used in the public interest for a certificate to that effect to be signed, in order that they may file a patent application under the act of March 3, 1883, as amended (35 U. S. C. sec. 45), without the payment of any fees.

Approved:

MICHAEL W. STRAUS,
Assistant Secretary.

FINALITY OF ADMINISTRATIVE FINDING THAT INVESTIGATION OF SAN CARLOS IRRIGATION PROJECT HAD BEEN COMPLETED

Opinion, September 23, 1944.

INDIAN IRRIGATION PROJECTS—ADMINISTRATIVE REDETERMINATION—COMPLETION
OF SAN CARLOS IRRIGATION INVESTIGATION—RESUMPTION OF COLLECTION OF
CONSTRUCTION CHARGES.

Public Resolution No. 40, approved August 5, 1939 (53 Stat. 1221), approved the order of the Secretary of the Interior of April 10, 1939, made under the act of June 22, 1936 (49 Stat. 1803), deferring the collection of irrigation construction charges pending the completion of an investigation of the San Carlos Irrigation Project. The Department, having determined on June 7, 1944, that the investigation had been completed, and having ordered the resumption of payment of construction charges, may not subsequently reopen the investigation, and thus in effect restore the moratorium. The applicable statutes cannot be interpreted to permit an administrative redetermination to be made.

HARPER, *Solicitor:*

I have before me a letter to Senator McFarland prepared for your [Assistant Secretary] signature by Mr. McCaskill in which it is proposed to inform the Senator that consideration will be given to a request made by the officials of the San Carlos Irrigation District to reopen the economic survey of the San Carlos Irrigation Project in order to investigate "certain aspects of the situation not adequately dealt with in the present study." There are mentioned specifically

in the letter "a fuller consideration of the power aspects, and also a discussion of possible effects upon the Project of proposed diversions from the Colorado River."

On June 7, 1944, however, you approved an Indian Office letter dated May 24, 1944, to Mr. C. J. Moody, the Project Engineer, which stated:

As you know, Public Resolution No. 40, 76th Congress, approved August 5, 1939 (53 Stat. 1221) approved the Order of the Secretary of the Interior of April 10, 1939 made under the Act of June 22, 1936 (49 Stat. 1803). The Order postponed the collection of irrigation construction charges on the San Carlos Project until the completion of the economics investigation of the project under the 1936 act. The investigation has now been completed. It is recommended by the Principal Agricultural Economist who was in charge of the investigation that the assessment and collection of construction charges be immediately resumed.

In the concluding sentence of this letter the Project Engineer was instructed that "the collection of construction charges will be resumed this year and that payment will be expected under the Public Notice and repayment contract on December 1 for the year 1944." The District, represented by Mr. Anderson, appeared before you to protest the resumption of payments on various grounds among which were the contentions that the investigation had not been completed, and that payments could not be resumed in 1944 because an assessment could not be made in time under the law of Arizona. I am advised that a conference was held in your office at which Senator McFarland and Mr. Anderson, as well as representatives of my office and the Indian Office, were present. After further conferences and extended consideration on your part, you sent the following telegram to the Project Engineer:

Notify San Carlos District letter of May 24, approved by the Department June 7, is modified to require payment December 1, 1945.

You thus reaffirmed your determination that the investigation of the San Carlos Irrigation Project had been completed, and modified only the time of repayment specified in the letter to the Project Engineer approved June 7, 1944. You were advised by me that you could lawfully direct that repayments should begin in 1945 rather than 1944 because the Department, in deferring collection of repayment construction charges by its order of April 10, 1939, until the investigation could be completed, and Congress, in approving this order, could not have intended to make it mandatory upon you to resume the collection of the charges irrespective of the provisions of the State law which were an integral part of the collection system. This ruling was in accord with the reasoning of the Tenth Circuit in the case of

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Board of County Commissioners of Creek County v. Seber, 130 F. (2d) 663, which was to the effect that a tax exemption granted by Congress applicable to Indian lands by virtue of the acts of June 20, 1936 (49 Stat. 1542), and May 19, 1937 (50 Stat. 188), could not have been intended to take effect irrespective of the provisions of State law governing the levy and assessment of the taxes.

It is thus now proposed to consider the reopening of an investigation which the Department twice held had been completed. It is true that the Department is not at this time promising to reopen the investigation. But there would seem to be no point in suggesting that an application be made unless a good *prima facie* case at least existed for continuing the investigation. I understand that a good deal of thought has already been devoted in the Indian Irrigation Service to the two subjects suggested for further investigation but they seem to have a rather remote bearing upon the purposes for which an investigation may be ordered by the Department under the act of June 22, 1936 (49 Stat. 1803, 25 U. S. C. sec. 389 *et seq.*). The investigation must relate to the question "whether the owners of non-Indian lands under Indian irrigation projects. * * * are unable to pay irrigation charges * * *." The power aspects of the investigation while relevant to the administration and operation of the project will for a long time to come fail to have any connection with the ability of the landowners to pay irrigation construction charges, for the act of March 7, 1928 (45 Stat. 200, 211), provides that the revenues from the sale of power shall be devoted—

to reimbursing the United States for the cost of developing such electrical power as that cost shall be determined by the Secretary of the Interior; second, to reimbursing the United States for the cost of the San Carlos Irrigation project; third, to payment of operation and maintenance charges, and the making of repairs and improvements on said project: *Provided further*, That reimbursements to the United States from power revenues shall not reduce the annual payments from landowners on account of the principal sum constituting the cost of construction of the power plant or the project works until such sum shall have been paid in full: * * *.

So far as the possibility of diverting water from the Colorado River is concerned this, too, can hardly be achieved in much less than a decade. It would seem that the project may involve an expenditure of almost a billion dollars, and a report on its feasibility is still to be made to Congress which will have to supply the funds. It can hardly be undertaken until after the war, nor can it be completed in less than five years. Under the circumstances it will be concluded that the purpose of reopening the investigation is not to secure more information reflecting on the ability of the San Carlos Irrigation

District to pay construction charges but to secure a further deferment of the moratorium which remains in effect as long as the investigation has not been completed.

However, even if it could be determined on reasonable grounds that the investigation made has been inadequate, I am of the opinion that the Department would be without authority to reverse its determination that the investigation had been completed. I must confess that the whole problem of the extent to which administrative determinations may be reconsidered and modified or set aside is a very troublesome one. It is often treated as a problem of "*administrative res. judicata*" although it is more akin to the judicial problem of vacating judgments during a term of court. The whole problem was hardly a subject of analysis until recent years.¹

While it is difficult to draw the line between the types of administrative action that are and are not subject to administrative reconsideration, it is well settled that some administrative determinations may not be reopened. While the question has been raised in a considerable number of cases in recent years in both the State and Federal courts involving the independent regulatory commissions and the departments of the Government,² the cases arising in this Department have been confined to attempted reversals of land determinations in connection with the issuance of patents by the General Land Office,³ grants of rights-of-way,⁴ or findings as to the character, location or boundaries of land,⁵ or to attempts to reverse determinations made in connection with the enrollment of Indians,⁶ determinations of heirship to Indian lands,⁷ or other rights in allotments.⁸ This

¹ Ernst Freund in his work, *Administrative Powers over Persons and Property* (Chicago 1928), notes "the relative paucity of decisions" (p. 286). The literature on the subject (as well as the case material) is, however, growing. See F. Trowbridge von Baur, *Federal Administrative Law*, 2 vols. (Chicago, 1942), vol. 1, chap. 13; James Hart, *An Introduction to Administrative Law* (N. Y. 1940, Chap. 15); *American Jurisprudence*, title "Public Administrative Law," vol. 42, secs. 161, 173-181; Noble K. Gregory, "Administrative Decisions as *Res Judicata*," in *California Law Review*, vol. XXIX (1941) 741-53; Ernest H. Schopflicher, "The Doctrine of *Res Judicata* in Administrative Law," in *Wisconsin Law Review* (1942), pp. 5-42, and 198-235; Notes in *Michigan Law Review*, vol. XXVII (1929) 677-83, and *Yale Law Journal*, XLIX (1940) 1250-78.

² The cases are assembled in the literature cited in the previous footnote.

³ See *United States v. Stone*, 69 U. S. 525; *Moore v. Robbins*, 96 U. S. 530; *Lane v. Watts*, 234 U. S. 525; *United States v. State Investment Co.*, 264 U. S. 206. But the Department may reverse itself prior to the issuance of final patent. *United States v. Kennedy*, 206 Fed. 47 (C. C. A. 5, 1913); *Greenameyer v. Coate*, 212 U. S. 434. And it may reverse a refusal to issue a patent. *Beley v. Naphtaly*, 169 U. S. 353. Moreover, the departmental findings in the issuance of a patent are not *res adjudicata* in such a sense that they are conclusive on the courts in subsequent litigation in which the patent is attacked, *Dickson v. Luck Land Co.*, 242 U. S. 371.

⁴ *Noble v. Union River Logging Co.*, 147 U. S. 165.

⁵ *New Orleans v. Paine*, 147 U. S. 261; *Michigan Land and Lumber Co. v. Rust*, 168 U. S. 589; *Lane v. Darlington*, 249 U. S. 331; *West v. Standard Oil Co.*, 278 U. S. 200.

⁶ See cases cited, p. 750, *infra*.

⁷ *Lane v. United States*, 241 U. S. 201.

⁸ *Knight v. Lane*, 228 U. S. 6.

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office has in recent years also considered the question in various other connections.⁹ While none of the cases involve the question of reopening an investigation, which had been found to have been completed,¹⁰ I am satisfied nevertheless that the existing legal authorities indicate that such action could not lawfully be taken. While some of the cases seem to regard various factors or formulas as decisive, each case really presents a separate problem of statutory construction. This seems to be the common conclusion of all the text writers and is really the inarticulate premise of all the court decisions. The statutory ban upon change or modification of administrative action may be clearly expressed, or it may be left to implication.¹¹ Sometimes it is said additionally that an administrative action is reversible if it is "administrative" or "executive" rather than "quasi-judicial."¹² This test is, however, valueless because of the difficulties in distinguishing between the two categories. Again it is said that an administrative determination may not be reversed if the "jurisdiction" of the administrative agency has been exhausted.¹³ This, too, is often the statement of a conclusion rather than an adequate rationalization of the result. This factor would seem to be better stated, as it sometimes is stated, in terms of continuing function,¹⁴

⁹ Solicitor's memorandum to the Secretary, dated October 31, 1936, *in re* Virginia Ores Corporation, War Minerals Claim No. 1071, pp. 50-51; *Lance Creek Independent Oil Producers and Royalty Owners' Association, Inc. v. Argo Oil Corp. et al.*, 57 I. D. 277 (petition for revocation of approval of a contract); Solicitor's memorandum to the Under Secretary dated May 29, 1941, *in re* the reconsideration of an award made by the Department [57 I. D. 87] of damages due to the Mohave and Chemehuevi Indians for lands taken from them by the United States for the use of the Metropolitan Water District of Southern California, p. 10; opinion of the Board of Appeals, dated February 27, 1942, *in re* claims of the Algoma, Lamm and Forest Lumber Companies arising out of timber contracts, 57 I. D. 501.

¹⁰ In fact, the only case which in any way involves an irrigation district is apparently *Wilbur v. Burley Irrigation District*, 58 F. (2d) 871 (App. D. C.).

¹¹ *United States v. Sherman*, 237 U. S. 146 and *Baldwin v. Milling Co.*, 307 U. S. 478, are good examples of cases in which the problem of administrative redetermination is considered entirely in terms of statutory construction.

¹² Examples of this common type of reasoning are to be found in *District of Columbia v. Cluss*, 103 U. S. 705; *Pearson v. Williams*, 202 U. S. 281; *West v. Standard Oil Co.*, 278 U. S. 200.

¹³ This is the reason usually given in the land cases holding the issuance of a patent to be final. The reason stated more practically is that a title must have a point of origin, and there would be no security in the public land States if the Department could cancel a patent.

¹⁴ See, for example, *Brougham v. Blanton Mfg. Co.*, 249 U. S. 495, 500; *West v. Standard Oil Co.*, 278 U. S. 200, 210; *Wilbur v. United States, ex rel. Kadrie*, 281 U. S. 206, 217. This would not seem to be a conclusive test, however. The Court of Claims has held in *Wilder v. United States*, 5 Ct. Cl. 468, that an administrative officer may not revoke his approval of a contract, and this, too, has been the position of this Department. But almost invariably an administrative officer has continuing duties under public contracts, and this is particularly true in the case of contracts for services to Indians approved by this Department under which the payment for the services is made from restricted funds. Unless there has been a change of position by actual performances of services, approval should probably have no magic effect. Even when services have been performed, payment

for when this is the case it is less likely that the legislature intended that the power of the administrative agency to act should be exhausted by a single exercise of the power. Perhaps the most important factor is the reliance of private parties upon an administrative decision, with a resulting change of position involving economic detriment, and this factor has been given great weight by the courts.¹⁵

A frequently cited case, both in the decisions of the courts and of this Department is *Garfield v. United States ex rel. Goldsby*, 30 App. D. C. 177, 183, which involved the question whether the Department could remove the name of a Cherokee Indian from a tribal roll which had been approved by the Department. In this case the Court said: "When the judgment or discretion of an executive officer has been completely exercised in the performance of a *specific* duty, the act performed is beyond his review or recall, unless power to that extent has also been conferred upon him" by statute. (*Italics added.*) This factor, which is only another form of the test of "continuing function," would seem to have some bearing upon the present case although it may be regarded only as dictum. The decision in the *Goldsby* case was affirmed by the United States Supreme Court in 211 U. S. 249 solely upon the ground that there had been no hearing prior to adjudication, and the substantive question of law involved was ultimately disposed of by the Supreme Court in another case, *Lowe v. Fisher*, 223 U. S. 95, which held that the Secretary of the Interior could reconsider his approval of the enrollment because under section 2 of the act of April 26, 1906 (34 Stat. 137), jurisdiction of the Secretary over the rolls was retained until March 4, 1907, and the reconsideration occurred prior to that date. However, in neither decision did the Supreme Court criticize the statement of the principle laid down by the Court of Appeals of the District of Columbia. In *Johnson v. Payne*, 253 U. S. 209, the Supreme Court even held that the Secretary of the Interior could change his mind about the enrollment of an Indian of one of the Five Civilized Tribes although he had given his approval of the enrollment in a letter to the Commissioner of Indian Affairs. Apparently, however, the name of the Indian had not yet been put on the official roll. The Court held, moreover, that the Secretary could revoke his approval without notice or hearing.

might be made on a *quantum meruit* basis, and the contract canceled. The contrary rulings have probably been influenced by the sanctity attached to contracts in our constitutional system.

¹⁵ This salutary rule was laid down as early as *Tate v. Carney*, 24 How. 357. An example of its recent application is to be found in *Wilbur v. Burley Irrigation District*, 58 F. (2d) 871 (App. D. C.).

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Some of the factors to which weight has been given by the decisions of the Supreme Court are obviously not involved in the present situation. Certainly there is no basis for contending that reconsideration and reversal of the determination that the investigation of the San Carlos Irrigation Project had been completed will adversely affect the economic interests of either the irrigation district or the individual landowners. But the public, as well as the private, interests are to be preserved.¹⁶ Congress authorized the construction of the irrigation system, and made the collection of construction charges mandatory. True, Congress subsequently granted a moratorium by Public Resolution No. 40, approved August 5, 1939 (53 Stat. 1221), but this moratorium is not to be stretched beyond its terms, and the mandatory duty of collecting construction charges remains except in so far as it has been suspended by the resolution.

It seems superficially that the Department has a continuing duty to perform in collecting the construction charges annually in accordance with the statutes governing the San Carlos Irrigation Project and the repayment contracts. This duty undoubtedly exists and it is continuing in character. But this is not a duty that has any necessary connection with the determination of the status of the investigation. This was a separate and *specific* duty which when performed restored the continuing function but which, so long as it was unperformed, suspended the continuing function of collecting construction charges. In the nature of things there was no continuing duty in determining whether the investigation had been completed. The power to perform a specific duty must necessarily be exhausted by a single exercise.

It is difficult to believe that Congress in confirming the departmental order made pursuant to the limited authority granted by the act of June 22, 1936 (49 Stat. 1803), which deferred the collection of construction charges until the investigation of the ability of the landowners to pay had been completed, intended to grant what might amount to a perpetual moratorium. For, logically, this must be the necessary result of holding that the Department might continue to change its mind about the question whether the investigation had been completed. Necessarily reasonable men might differ widely in opinion in judging the completeness of an investigation. There is no end to research and investigation; and how long such activities will be continued must depend entirely on the zeal, energy, and funds of the researcher and investigator. In view of this rather notorious char-

¹⁶ The public interest in the reconsideration of an administrative determination is stressed in *West v. Standard Oil Co.*, 278 U. S. 200.

acteristic of all investigations, it should not be supposed that it was the legislative intent of Congress to delegate to the Department anything but a limited and circumscribed authority, and to the beneficiaries of the San Carlos Irrigation Project anything but a moratorium of some measurable duration. Indeed it may perhaps even be argued that it was the intention of Congress to limit the moratorium to such time as would reasonably be necessary to complete the investigation, and that when this time had once elapsed, the Department was bound to resume the collection of construction charges. Over five years have already elapsed since the Department ordered the investigation and its action was confirmed by Congress.

From another point of view, the possibility of reopening the investigation may present a pure problem of legislative interpretation unrelated even to the problem of administrative redetermination. The order of the Secretary, confirmed by Congress, does not say in so many words that the collection of construction charges is deferred until the Secretary shall find as a fact that the investigation has been completed. Conceivably, therefore, it might be argued that the Department's determination whether the investigation had been completed was only an incident of its annual duty under the statutes requiring collection of construction charges to collect such charges. It would be one consequence of this interpretation that the determination of the status of the investigation would become in truth part and parcel of a continuing duty. But another consequence would be that if the Department's attempt to collect were resisted in the courts, the courts would have entire liberty to determine objectively for themselves whether the investigation had been completed, and the departmental determination would not have any conclusive effect. It is impossible to believe that what was done contemplated this sort of legislative, judicial and administrative anarchy. Since the order, confirmed by Congress, was made by the Secretary, who was charged with a statutory duty to collect construction charges, a finding by the Secretary was necessarily contemplated, and express language making provision for such a determination must be regarded as superfluous. This perfectly natural and reasonable construction would bring some order into the administration of the irrigation project.

I am, of course, not insensible to the practical considerations which have made it seem desirable to afford the San Carlos Irrigation District some measure of relief against the resumption of construction payments. I understand that the Indian Irrigation Service has under consideration a recommendation that in the future such payments should be made in proportion to the amount of water available in a given year. Under such circumstances the water users are naturally

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loath to resume payments in accordance with the existing law and their repayment contracts, even though they can afford to do so at the present time. But a change ultimately in the scheme of payment will require legislation by Congress, and cannot be achieved under existing law. It would seem desirable, perhaps, in the future in deferring the payment of construction charges pending an investigation to provide that payments shall not be resumed until after a report has been made to Congress, and Congress has acted upon the report. But the moratorium granted in the present instance was only until the investigation should be completed. I should also inform you that you may, of course, under the act of June 22, 1936, order another investigation, and defer payment of construction charges pending the investigation, but such action would require confirmation by Congress in order to make it effective.

Finally, I must express some doubt concerning the assurances given that the San Carlos Irrigation District will pay "voluntarily" in accordance with the sliding scale suggested in the Walker Report in the event that legislation to authorize such payment fails of enactment. I am not, of course, questioning the good faith of those who are prepared to give these assurances. But the execution of the promises may be practically and legally impossible of fulfillment. Certainly if the Irrigation District does not have the requisite funds in its treasury, it will be unable to raise them by assessment, since no assessable sum would be legally due. If it has the money in its treasury, it may be advised that it cannot legally make a voluntary payment. An irrigation district is at least a quasi-public corporation, and as such it may not have the same freedom of action in handling funds that is accorded to private corporations.

I would suggest that the attached letter be sent to Senator McFarland, informing him that the Department has come to the regretful conclusion that it is not legally possible to reopen the investigation.

OHIO OIL COMPANY, M. D. WOOLERY

v.

W. F. KISSINGER, YALE OIL CORP.

Decided September 27, 1944

MINING CLAIM—LOCATION ON LAND CLASSIFIED AS COAL.

The mere classification of land as coal land does not bar a location of the land under the mining law for nonmetallic minerals unless in fact the land possesses value for coal.

Arthur K. Lee et al., 51 L. D. 119; *John McFayden et al.*, 51 L. D. 436, cited and applied.

MINING CLAIM—DECLARATION OF NULLITY.

It is error to adjudge a mining claim located on land classified as coal void because of such classification without giving the claimant thereof an opportunity to dispute the classification.

OIL AND GAS LEASE—CONFLICT WITH MINING CLAIM.

Where an oil and gas lease is issued on land shown by the records as free from adverse claim, the issuance of the lease is regular and the lease prima facie valid, notwithstanding the existence of an asserted mining location for which no application for patent has been filed, and the burden of proof is on the mineral claimant to show he has a superior right to the possession of the land and that the lease is consequently invalid.

MINING CLAIM—PROTEST.

A mining claimant of an asserted oil placer claim who protests against the issuance of an oil and gas lease on land classified and priced as coal land and within the boundaries of petroleum reserve, to sustain his allegations of a superior right will be required to show that the land possesses no value for coal and at the date of the petroleum withdrawal that the claimants of the conflicting mining claim, in the absence of discovery of mineral on that date, were in diligent prosecution of work leading to the discovery of oil or gas, which work was continued with diligence to discovery.

COAL LAND—CLASSIFICATION.

No review of the classification of land as coal land is warranted upon allegations of incompleteness or inadequacy in the examination of the land upon which the classification is founded.

It will be presumed in the absence of proof to the contrary that the classification was based upon a proper and adequate examination of the land.

CHAPMAN, Assistant Secretary:

On January 1, 1942, a 5-year oil and gas lease, Cheyenne 065580, was issued to W. F. Kissinger, embracing lot 2, SW $\frac{1}{4}$ NE $\frac{1}{4}$ Sec. 23, T. 58 N., R. 100 W., 6th P. M., Wyoming. On June 3, 1943, an assignment of the lease to the Yale Oil Corporation was approved.

The land in the above-described township was withdrawn from coal entry on October 15, 1906, for examination and classification with respect to coal values, and on March 12, 1910, the tracts above described were classified as coal land and priced at \$35 an acre. By Executive order of December 6, 1915, the area in question, together with other lands, was, under and pursuant to the act of June 25, 1910 (36 Stat. 847), as amended by the act of August 24, 1912 (37 Stat. 497, 43 U. S. C. secs. 141-143), and subject to the provisions of the act of July 17, 1914 (38 Stat. 509, 30 U. S. C. secs. 121-123), "withdrawn from settlement, sale, or entry, and reserved for classification and in aid of legislation," and placed in Petroleum Reserve No. 41.

On August 14, 1943, The Ohio Oil Company and M. D. Woolery filed a protest against the issuance of the lease. The protest alleged

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that on October 15, 1915, the Mack No. 5 Placer Mining Claim had been located on the NE $\frac{1}{4}$ Sec. 23, T. 58 N., R. 100 W., by M. D. Woolery and seven other named persons; that the claim was then and has been continuously since that time and is now a valid subsisting oil placer mining claim; and that—

Prior to the time of the Petroleum Withdrawal of December 6, 1915, the said locators through their authorized agents and representatives commenced the prosecution of work leading to a discovery of oil on said claim; that at the time of such Withdrawal said locators through said agents were in diligent prosecution of such work and continued in diligent prosecution of such work until discovery of oil in commercial quantities resulted therefrom; and that since the location of such claim the said locators through their agents, representatives and lessees have been in continuous possession and operation of the lands included in such claim.

The said The Ohio Oil Company is the holder of an oil and gas lease from the said locators, as lessors, to said Company, as lessee, which said lease was dated May 21, 1917, and filed for record in Book 111, page 490, Public Records of Park County, Wyoming, and which said lease is valid and in full force and effect. The said locators and this Company have been in open, notorious, undisputed, peaceful and continuous possession of all of the lands described in said Mack No. 5 Oil Placer Mining Claim since the date of the location thereof and this Company has, as above stated, for many years been in possession and operation thereof and has produced oil therefrom and is now in possession and operation and is producing oil therefrom.

The undersigned, for themselves and on behalf of said locators and their successors, hereby protest against the action of the Secretary of the Interior in the issuance of said lease as casting a cloud upon the valid possessory rights and superior title of said locators; and further demand that the purported lease be cancelled in its entirety and the records cleared of any reference thereto; and further demand that no action be taken by the officers of the Department of the Interior allowing or permitting the said W. F. Kissinger or his agents, successors, assigns or any other person purporting to act by, through or under him by virtue of said purported lease, or otherwise, to operate, enter upon or operate any portion of the lands included in said Mack No. 5 Oil Placer Mining Claim which, as above stated, covers all of the lands described in said lease Cheyenne 065580 and other lands.

Response to the protest was filed on behalf of Kissinger, the lessee, which called attention to the status of the land as coal land and as part of the petroleum reserve. In addition, the response set forth purported contents of the records of The Ohio Oil Company relating to the character and the time of performance of exploratory work on the Mack No. 5 and other claims of the Mack group and to the reports of oil production on Mack No. 5. This data, it was maintained, disclosed that on December 6, 1915, the claimants of Mack No. 5 were not in diligent prosecution of work leading to the discovery of oil or gas.

By decision of May 24, 1944, the Commissioner of the General Land Office, adverting to the fact that in the protest no mention was made of the classification of the land as coal land prior to the asserted location, held as follows:

The Department held, in the case of *Arthur K. Lee et al.* (51 L. D. 119), in substance, that land classified as coal and valuable therefor is not subject to location, entry and patent under the general mining laws of the United States. See also *Empire Gas and Fuel Company* (51 L. D. 424). The classification of the land as coal land is prima facie evidence of its value for coal, and the land being so classified when the Mack No. 5 placer mining claim was located, the mining claim is invalid and is hereby declared null and void.

The protestants have appealed and say—

* * * that the said decision is void and of no legal effect whatsoever, and show unto the Secretary of the Interior as follows:

That in connection with said purported decision of May 24, 1944, no notice was given to The Ohio Oil Company or to M. D. Woolery and no hearing was had nor any opportunity afforded to be heard prior to the time that said purported decision of May 24, 1944, was entered; that the undersigned are informed and believe that no notice and opportunity to be heard was given to any of the locators of Mack #5 Oil Placer Mining Claim prior to the time that said purported decision of May 24, 1944, was entered; that such unwarranted action and purported decision are therefore in contravention of and a direct violation of the Fifth Amendment to the Constitution of the United States, the Leasing Act of February 25, 1920, and the Regulations and Decision of the Department of the Interior.

That the action of the Department of the Interior in attempting to classify said land as coal land on March 12, 1910, was void and of no force nor effect for the reason that there does not exist upon any part of the land covered by said Mack #5 Oil Placer Mining Claim coal known to be of sufficient thickness and quality to warrant or justify classification of said land as coal land; that no test as to heat value has been made in any examination or re-examination by the United States; that upon a part of the land covered by said claim there is no coal whatsoever; that upon a part of the land covered by said claim such carbonaceous material as is in existence is at a depth too great to warrant or justify the classification of said land as coal land even if the said carbonaceous material had been of the quality and thickness otherwise essential for coal classification. The undersigned respectfully call attention to the full decision in the case of *Arthur K. Lee et al.*, 51 L. D. 119, and to the decision in the case of *John McFayden et al.*, 51 L. D. 436, wherein it is stated:

“While the Department in its unreported decision of June 12, 1918, in *American Potash Company*, cited in *Arthur K. Lee et al.*, *supra*, declared in effect that lands classified and appraised as valuable coal lands are not subject to location, application, and patent under the general mining laws on account of nonmetallic minerals, that ruling was modified or construed by the decision in *Arthur K. Lee et al.*, so as to require that such lands, in addition to being classified as coal, should also possess value for coal.”

Without admitting the validity of the above-mentioned coal classification or said decision of May 24, 1944, but expressly denying the same, the undersigned, for themselves and on behalf of the locators of said Mack #5 Oil Placer Mining

September 27, 1944

Claim, and their successors and assigns, do hereby apply for a review of the said coal classification as to the land covered by said claim.

Appellants further show to the Secretary of the Interior that no complete or adequate examination has ever been made by representatives of the Department of the Interior with a view to determining whether or not said lands were properly classified as coal lands; that no accurate survey has ever been made to determine exactly what part of said land, if any, is underlain by coal; that no accurate measurement has ever been made to determine the exact thickness of the coal or carbonaceous material under any of such land; that no test has been made as to the heat value of the coal or carbonaceous material under said land; that no examination has been made to determine the depth below the surface of any coal on said land; and further, appellants show that such examination as has been heretofore made was superficial in character and did not take into account the great values involved in oil production; that since the examination of said lands for the purpose of coal classification oil production has been found in the Tensleep Sands on nearby lands, as a result of which discovery lands covered by said Mack #5 Oil Placer Mining Claim are believed to have great value warranting a careful and painstaking examination of such lands to determine the correctness of the purported coal classification.

The undersigned, for themselves and on behalf of the locators of said Mack #5 claim, and their successors and assigns, hereby request that an opportunity be afforded to present proof to the Secretary of the Interior as to the non-coal character of the land covered by the claim and that the action of the Department of the Interior in classifying said land as coal land be vacated and annulled.

The decisions in the cases of *Arthur K. Lee et al.*, 51 L. D. 119, and *John McFayden et al.*, 51 L. D. 436, unquestionably hold that the mere classification of land as coal land does not bar a location of the land under the mining law for nonmetallic minerals, unless the land in fact possesses value for coal. In the *McFayden* case (which incidentally involved some of the Mack group of claims of which the present claim is a part), it was held that—

* * * a mineral claimant, seeking patent to a tract on the basis of an asserted location on account of a nonmetallic mineral, made thereof after its classification and appraisal as valuable for coal, all else being regular, would clearly be entitled, before the outright rejection of his application, to an opportunity to show, if he could, that such classification was, in fact, erroneous.

The classification of the land being therefore only presumptively valid and open to challenge by the mineral claimants, it was clearly error to declare the claim void without giving them an opportunity to dispute the classification, although the protest could have been dismissed without more for the reason that it did not challenge the propriety and validity of the classification.

The allegations of the protest supplemented by the allegations upon appeal in effect charge that the oil and gas lease is invalid for the

reason that the land was embraced in a valid location under the mining act at the time of the issuance of the lease. The mining claimants had not applied for a patent to their claim, and at the time of the issuance of the lease, the tract books of the General Land Office showed the land to be free from adverse claim and to be subject to lease. The issuance of the lease was therefore regular and the lease is prima facie valid. The long-established rule is that the burden of proof is on one who attacks an existing entry or filing (*Lawrence v. Phillips*, 6 L. D. 140; *United States v. Barbour*, *id.* 432; *Tibergheim v. Spellner*, *id.* 483; *Moss v. Quincey*, 7 L. D. 373; *Willis v. Parker*, 8 L. D. 623; *Tangerman et al. v. Aurora Hill Mining Co.*, 9 L. D. 538). It is therefore incumbent upon the protestants to prove every essential fact showing that they have a superior right of possession to the land and that the lease is consequently invalid. To sustain their allegations, the protestants will be required to show that the land embraced in the lease possesses no value for coal and that the classification of the land as coal land was therefore erroneous, and that on December 6, 1915, the claimants of the Mack No. 5 claim were in diligent prosecution of work thereon leading to the discovery of oil or gas, which work was continued with diligence to discovery.

No review of the classification of the land is warranted because of any allegations of incompleteness or inadequacy in the examination of the land upon which the classification was founded. The methods for the establishment of the coal character of land are not rigidly prescribed by law or regulation, but are modified from time to time as experience may dictate (*Lindley on Mines* (3d ed.), sec. 496). The presence of such deposits may be determined upon authenticated evidence of conditions which constitute a sufficient guide to the geologist or coal expert (*Instructions*, 34 L. D. 194). It will be presumed in the absence of proof to the contrary that the classification was based upon a proper and adequate examination of the land.

In accordance with these views a hearing on the issues between the parties should be held, in which the Government is to intervene, and the case is remanded for that purpose and for adjudication on the evidence adduced.

The decision of the Commissioner is modified accordingly.

Modified.

RIGHTS-OF-WAY OVER ALLOTTED INDIAN LANDS

Opinion, October 5, 1944

RIGHTS-OF-WAY—TELEPHONE AND TELEGRAPH LINES—PIPE LINES—INDIAN RESERVATIONS—ALLOTTED LANDS—STATUTORY CONSTRUCTION.

Rights-of-way across allotted Indian lands may be granted to pipe-line companies for the erection and maintenance of telephone and telegraph lines to be used in connection with their pipe-line business under the act of March 11, 1904 (33 Stat. 65, 25 U. S. C. sec. 321), as amended.

HARPER, *Solicitor*:

I am returning for your [Commissioner of Indian Affairs] further consideration the attached letter to the Superintendent of the Five Civilized Tribes Agency referring to the memorandum brief submitted by Thomas W. Leahy, Esq., of Muskogee, Oklahoma, on behalf of the Sinclair Refining Company, discussing the rights of pipe-line companies who acquired telephone and telegraph rights-of-way over allotted lands of Indians of the Five Civilized Tribes under section 3 of the act of March 3, 1901.¹

I do not agree with the conclusions reached in the brief, first, that the Secretary should reverse the recent ruling of this office that section 3 of the act of March 3, 1901, authorizes the Secretary of the Interior to grant rights-of-way in the nature of easements for general telephone and telegraph purposes only,² and, second, that the acts of February 15, 1901,³ and March 4, 1911,⁴ do not apply to

¹ 31 Stat. 1058, 1083 (25 U. S. C. sec. 319), providing: "That the Secretary of the Interior is hereby authorized and empowered to grant a right of way, in the nature of an easement, for the construction, operation, and maintenance of telephone and telegraph lines and offices for general telephone and telegraph business through any Indian reservation, through any lands held by an Indian tribe or nation in the Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation, upon the terms and conditions herein expressed. * * * The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval; * * *"

² 58 I. D. 85, *supra*.

³ 31 Stat. 790, as amended by the act of March 4, 1940 (54 Stat. 41, 43 U. S. C. sec. 959), providing: "That the Secretary of the Interior be, and hereby is, authorized and empowered, under general regulations to be fixed by him, to permit the use of rights of way through the public lands, forest and other reservations of the United States, * * * for telephone and telegraph purposes, * * * by any citizen, association, or corporation of the United States, where it is intended by such to exercise the use permitted hereunder or any one or more of the purposes herein named: *Provided*, That such permits shall be allowed within or through any of said parks or any forest, military, Indian, or other reservation only upon the approval of the chief officer of the Department under whose supervision such park or reservation falls and upon a finding by him that the same is not incompatible with the public interest: * * * *And provided further*, That

the allotted lands of the Indians of the Five Civilized Tribes. However, in my opinion, the situation of the pipe-line companies, as disclosed by the brief, requires a more thorough analysis than has been accorded it in the attached letter.

I agree with you that no attempt should be made at this time to invalidate rights-of-way granted for the construction and maintenance of private telephone and telegraph lines under the now abandoned interpretation of section 3 of the act of March 3, 1901.⁵ All pipe-line companies who have, in the past, acquired such telephone and telegraph line rights-of-way should be permitted to maintain their telephone and telegraph lines, constructed under the rights-of-way previously granted to them, so long as they maintain their pipe lines across allotted Indian lands.

I do not agree with your conclusion that the acts of February 15, 1901, and March 4, 1911, are the only acts under which rights-of-way for telephone and telegraph lines to be used by pipe-line companies in connection with their pipe-line business may in the future be granted to such companies.

The unwillingness of the pipe-line companies doing business in Oklahoma to accept the conclusion of this office⁶ that the acts of February 15, 1901, and March 4, 1911, are applicable to the allotted lands of the Indians of the Five Civilized Tribes, notwithstanding the opinion of the United States Supreme Court in *United States v. Oklahoma Gas and Electric Company*,⁷ has led me to reexamine the practice of the Department with respect to the granting of rights-of-way to pipe-line companies.

any permission given by the Secretary of the Interior under the provisions of this Act may be revoked by him or his successor in his discretion, and shall not be held to confer any right, or easement, or interest in, to, or over any public land, reservation, or park."

⁴ 36 Stat. 1235, 1253 (43 U. S. C. sec. 961), providing: "That the head of the department having jurisdiction over the lands be, and he hereby is, authorized and empowered, under general regulations to be fixed by him, to grant an easement for rights of way, for a period not exceeding fifty years from the date of the issuance of such grant, over, across, and upon the public lands, national forests, and reservations of the United States for electrical poles and lines for the transmission and distribution of electrical power, and for poles and lines for telephone and telegraph purposes, to the extent of twenty feet on each side of the center line of such electrical, telephone and telegraph lines and poles, to any citizen, association, or corporation of the United States, where it is intended by such to exercise the right of way herein granted for any one or more of the purposes herein named: *Provided*, That such right of way shall be allowed within or through any national park, national forest, military, Indian, or any other reservation only upon the approval of the chief officer of the department under whose supervision or control such reservation falls, and upon a finding by him that the same is not incompatible with the public interest: * * *"

⁵ See in this connection the opinion of this office relating to rights-of-way across the lands of the Flathead Indians, approved on January 27, 1943, 58 I. D. 319, *supra*.

⁶ Memorandum of April 21, 1943, relating to the application of the Pure Transportation Company for a telephone line right-of-way appurtenant to an oil and gas pipe line.

⁷ 318 U. S. 206.

October 5, 1944

Without in any manner disturbing the recent rulings of this office that section 3 of the act of March 3, 1901, permits the granting of rights-of-way for general telephone and telegraph business only across Indian lands and that the acts of February 15, 1901, and March 4, 1911, are applicable to the allotted lands of the Indians of the Five Civilized Tribes, I am of the opinion that the pipe-line companies may acquire rights-of-way for telephone and telegraph lines to be used in conjunction with their pipe-line business under the act of March 11, 1904.⁸ That act authorizes the Secretary of the Interior—

to grant a right of way in the nature of an easement for the construction, operation, and maintenance of pipe lines for the conveyance of oil and gas through any Indian reservation, through any lands held by an Indian tribe or nation in the former Indian Territory, through any lands reserved for an Indian agency or Indian school, or for other purpose in connection with the Indian Service, or through any lands which have been allotted in severalty to any individual Indian under any law or treaty, but which have not been conveyed to the allottee with full power of alienation upon the terms and conditions herein expressed. * * * The compensation to be paid the tribes in their tribal capacity and the individual allottees for such right of way through their lands shall be determined in such manner as the Secretary of the Interior may direct, and shall be subject to his final approval. * * * and nothing herein shall authorize the use of such right of way except for pipe line, and then only so far as may be necessary for its construction, maintenance, and care: *Provided*, That the rights herein granted shall not extend beyond a period of twenty years: *Provided further*, That the Secretary of the Interior, at the expiration of said twenty years, may extend the right to maintain any pipe line constructed under this section for another period not to exceed twenty years from the expiration of the first right, upon such terms and conditions as he may deem proper. * * *

I am convinced that the practical construction of this act, namely that a right-of-way acquired by a pipe-line company thereunder did not carry with it the right to erect private telephone and telegraph lines to be used in the maintenance and operation of its pipe lines, is too narrow and should no longer be followed. I find no formal departmental ruling placing such a limited construction on the act, nevertheless the attached file, relating to the rights-of-way now owned by the Sinclair Refining Company, reveals the position which has been adopted.

Early in the year 1918, the Pierce Pipe Line Company, predecessor in interest of the Sinclair Refining Company, applied for a pipe-line right-of-way across certain restricted lands of Indians of the Five Civilized Tribes. The company was informed at that time

⁸ 33 Stat. 65, as amended by the act of March 2, 1917 (39 Stat. 973, 25 U. S. C. sec. 321).
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that a pipe-line right-of-way under the 1904 act did not carry with it the right to construct telephone and telegraph lines to be used in conjunction with its pipe lines. The company thereafter applied for the additional right-of-way, setting forth in its application that the right-of-way applied for ran parallel to its requested pipe-line right-of-way and that it was to be used by the pipe-line company in connection with the operation of said pipe line, as a private line. Damages were assessed for both the pipe-line and telephone and telegraph rights-of-way and on July 23, 1919, the Department approved the application for the pipe-line right-of-way under the act of March 11, 1904, and the telephone and telegraph right-of-way under the act of March 3, 1901. An extension of its pipe-line right-of-way for a further period of 20 years was approved by the Department on March 7, 1940.

It is obvious that Congress, by the act of March 11, 1904, clearly contemplated that the rights-of-way authorized to be granted thereunder should be sufficient not only for the pipe lines themselves but for the efficient construction, operation and maintenance thereof. The act in plain language authorizes the granting of rights-of-way across allotted lands of Indians not only for pipe lines but for their construction, operation and maintenance. Thus the act is broad enough to permit the granting of rights-of-way for any purpose essential to the construction, operation and maintenance of pipe lines.

The question may arise as to whether the use of private telephone and telegraph lines is essential to the operation and maintenance of pipe lines. The answer, I think, is found in the applications which have in the past been made by pipe-line companies for authority to construct and maintain private telephone and telegraph lines to be used as an adjunct to their pipe-line business across the same lands covered by their pipe-line rights-of-way. Certainly the companies would not incur the expense incident to the acquisition of rights-of-way and the erection and maintenance of such lines if they were not essential to the conduct of their pipe-line business.

The granting of rights-of-way for private telephone and telegraph lines to be used in connection with the pipe lines is, in my opinion, as much within the spirit of the statute as the granting of rights-of-way for pumping stations and tank sites, which is now permitted under the departmental regulations.⁹

The construction which I have placed on the statute is in accord with the view expressed by the courts in connection with private

⁹ 25 CFR 256.28.

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telephone lines used in conjunction with the operation and maintenance of electric transmission lines.¹⁰

I suggest, therefore, that in the future when pipe-line companies apply for rights-of-way for telephone or telegraph lines to be used in connection with their pipe-line business across allotted Indian lands included or to be included in pipe-line rights-of-way, the rights-of-way for the telephone or telegraph purposes should be granted and damages assessed under the act of March 11, 1904.

Aside from the fact that the act is broad enough to permit the acquisition of such rights-of-way, in my opinion the granting of rights-of-way under the authority of two separate acts when the same rights-of-way can be granted under one act leads to unnecessary administrative complications.

If the practice which I have suggested is followed, no question will arise as to when the telephone and telegraph rights-of-way will expire and no question will arise as to whether the particular allotted lands desired to be crossed are within or without an Indian reservation, since the act of March 11, 1904, permits the crossing of any lands allotted in severalty where the allottee does not have full power of alienation.

Approved:

OSCAR L. CHAPMAN,
Assistant Secretary.

ROYALTY PAYMENTS TO EMPLOYEES OF THE GOVERNMENT FOR USE OF THEIR PATENTS

Opinion, November 9, 1944

PATENTS—USE OF DEVICES PATENTED BY GOVERNMENT EMPLOYEES—ROYALTY
PAYMENTS—ACT OF JUNE 25, 1910, AS AMENDED BY ACT OF JULY 1, 1918—
PROTECTION TO CONTRACTORS—ACT OF OCTOBER 31, 1942.

Bureaus of the Interior Department are not authorized to pay royalties for the use of patented devices to employees of the United States Government or their assignees, or to former employees of the Government who invented or discovered the devices while they were employed by the Government.

Specifications on Interior Department contracts may properly include provisions stating that the United States has the right to use inventions patented by employees of the United States and that no royalties are to be chargeable to the United States for the use of such inventions.

Contractors authorized by the Bureaus of the Interior Department to use inventions patented by employees of the United States are protected from

¹⁰ Cf. *Swendig et al. v. Washington Water Power Co.*, 265 U. S. 322 (1924); *Washington Water Power Co. v. Harbaugh*, 253 Fed. 681 (D. C. Idaho, 1918).

liability to the patentees for infringement and for payment of royalties by the act of June 25, 1910 (36 Stat. 851), as amended by the act of July 1, 1918 (40 Stat. 705, 35 U. S. C. sec. 68).

HARPER, Solicitor:

My views have been informally requested concerning a proposed circular letter relating to the preparation of specifications requiring or permitting the use of inventions patented by employees of the Bureau of Reclamation. A review of the file indicates that the proposed letter fails to accomplish the purposes detailed in the Secretary's memorandum of February 19, and that the difficulties in the way of executing those purposes cited in the August 23 memorandum from Acting Chief Engineer Walker R. Young are more illusory than real.

By the inclusion in specifications requiring or permitting the use of devices covered by patents held by employees of the Bureau of Reclamation of the statement that the United States has the right to the use of such devices, royalty free, Secretary Ickes desired (1) to prevent the accusation that employees of the Bureau are profiting from Government use of their inventions, and (2) to allow contractors not specifically licensed to use the inventions to enter bids for contracts requiring or permitting the use of such inventions. The proposed circular letter achieves these purposes only when the United States has explicitly been given shop rights to a patent granted under the act of March 3, 1883, as amended (35 U. S. C. sec. 45).

On the authority of a decision rendered by the Comptroller General on November 20, 1934 (A-56442, 14 Comp. Gen. 396), it would appear that the payment of royalties by the United States to a Federal employee or to a contractor for the benefit of a Federal employee is without legal basis, and therefore that the procedure proposed in the circular letter implicitly permitting royalty payments in cases where the United States has not been granted shop rights under the act of March 3, 1883, is not authorized.

In the decision mentioned, the Bureau of Reclamation, preparing the plans for the Norris Dam on behalf of the Tennessee Valley Authority, specified the use of certain cableway towers, patented by one Ackerman. A letter accompanying the bid of the Virginia Bridge & Iron Co. stated that the bid included \$14,000 to cover patent royalties on the cableway towers, and that the bid could be reduced by that amount if the Government would assume responsibility for such royalties. The bid was accepted, excluding the royalties from the contract price. Mr. Ackerman, at the time the bid was accepted, although not at the time the invitations for bids were issued, was an employee of the Tennessee Valley Authority,

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and he had been an employee of the Panama Canal when he filed his patent application for the device in question. In the circumstances, the question of payment to Mr. Ackerman was submitted to the Comptroller General.

Quoting the act of June 25, 1910 (36 Stat. 851), as amended by the act of July 1, 1918 (40 Stat. 705, 35 U. S. C. sec. 68),¹ the Comptroller General denied Mr. Ackerman's claim for the royalties in the following words:

The purpose of this enactment is clear—to prohibit recovery from the Government by an employee as patentee or as assignee of a patentee, on a claim arising during such employment, or for use by the Government of a patented device discovered or invented during employment by the Government.

* * * the facts are that he [Mr. Ackerman] was employed in the service of the Government of the United States when he applied for the patent, when the patent issued, when the patented device was employed, when his claim thereunder arose, and when his claim was made.

Consequently, *there is no legal basis for charging public moneys with the item of \$14,000 or any part thereof as royalty on the equipment furnished by the contractor.* [Italics supplied.]

It will be noted that the decision is not based upon an unauthorized or tortious use of the invention, although the statute quoted in terms refers only to the use of inventions without permission from the owner. The principles applied are equally applicable whether or not the use of the invention by the contractor on behalf of the United States is under license from the patentee. It was settled in *Crozier v. Krupp*, 224 U. S. 290 (1912), that the act of June 25, 1910, was in effect a statute giving the United States the right of eminent domain with respect to patents rather than a statute allowing recovery for the tortious use of patents by the Government. Accordingly, in its sovereign use of a patent it is immaterial whether or not the Government has secured a license from its employee.

Specifications, therefore, may properly include provisions indicating that the United States has the right to use inventions patented by employees of the United States Government, and that no royalties are to be chargeable for the use of patents owned by any employee of the United States or the assignee of any such employee, or for the use of any device discovered or invented by any person when

¹ "That whenever an invention described in and covered by a patent of the United States shall hereafter be used or manufactured by or for the United States without license of the owner thereof or lawful right to use or manufacture the same, such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture: *Provided, however,* * * * That the benefits of this Act shall not inure to any patentee who, when he makes such claim, is in the employment or service of the Government of the United States, or the assignee of any such patentee; nor shall this Act apply to any device discovered or invented by such employee during the time of his employment or service."

he was employed by the Government, irrespective of whether he is an employee at the time of the contract.

The contractor is protected from liability to the patentee for infringement and payment of royalties by the provision of the act of June 25, 1910, as amended, stating that—

* * * whenever an invention * * * shall hereafter be used or manufactured by or for the United States * * * *such owner's remedy shall be by suit against the United States in the Court of Claims for the recovery of his reasonable and entire compensation for such use and manufacture:* * * * [Italics supplied.]

It was decided in *Crozier v. Krupp, supra*, that the remedy authorized by the act was the sole remedy available to a patentee whose invention was used by or on behalf of the Government. The fact that this remedy is not available to Government employees does not give them any rights outside the act.

Further protection is afforded persons working on contracts with the United States by the act of October 31, 1942 (56 Stat. 1013, 1014, 35 U. S. C. sec. 94), which provides as follows:

* * * for the purposes of the Act of June 25, 1910, as amended (40 Stat. 705, 35 U. S. C. 68), the use or manufacture of an invention described in and covered by a patent of the United States by a contractor, a subcontractor, or any person, firm, or corporation for the Government and with the authorization or consent of the Government, shall be construed as use or manufacture for the United States.

Accordingly, I am of the opinion that literal compliance with the Secretary's February 19 memorandum is not only feasible but is required by law.

Approved:

MICHAEL W. STRAUS,
Assistant Secretary.

EXTENSION OF OIL AND GAS LEASE PURSUANT TO ACTS OF DECEMBER 22, 1943, AND SEPTEMBER 27, 1944, WHERE LEASED LANDS ARE PARTLY WITHIN KNOWN PRODUCING STRUCTURE

Opinion, December 6, 1944

STATUTORY CONSTRUCTION—ACT OF JULY 29, 1942—OIL AND GAS LEASE—PREFERENCE RIGHTS.

Statutory provisions granting preference rights to oil and gas leases are construed strictly in favor of a denial of the right where a case is not clearly within the scope of such provision.

STATUTORY CONSTRUCTION—ACT OF JULY 29, 1942—OIL AND GAS LEASE—LANDS PARTLY WITHIN KNOWN PRODUCING STRUCTURE ON EXPIRATION DATE—PREFERENCE RIGHT TO NEW LEASE.

December 6, 1944

Section 1 of the act of July 29, 1942 (56 Stat. 726, 30 U. S. C. sec. 226b), grants a preference right to a new lease only with respect to that portion of the lands which is outside a known producing structure on the date of the expiration of the lease.

STATUTORY CONSTRUCTION—ACT OF JULY 29, 1942, AS AMENDED DECEMBER 22, 1943, AND SEPTEMBER 27, 1944—OIL AND GAS LEASE—LANDS PARTLY WITHIN KNOWN PRODUCING STRUCTURE ON EXPIRATION DATE—EFFECT OF FAILURE TO APPLY FOR NEW LEASE OF LANDS OUTSIDE STRUCTURE.

If no application for a new lease is made with respect to that part of the leased lands which is outside of a known producing structure within 90 days prior to the expiration date of a 5-year lease, the lease on such portion, if nonproductive, is terminated at the end of the 5-year period.

STATUTORY CONSTRUCTION—ACT OF JULY 29, 1942, AS AMENDED DECEMBER 22, 1943, AND SEPTEMBER 27, 1944—OIL AND GAS LEASE—LANDS PARTLY WITHIN KNOWN PRODUCING STRUCTURE ON EXPIRATION DATE—EXTENSION OF LEASE.

A lease of lands which are partly within a known producing oil and gas structure on the date of the expiration of the lease is not extended in its entirety under the act of December 22, 1943 (57 Stat. 608, 30 U. S. C. sec. 226b), and the act of September 27, 1944 (58 Stat. 755), even though the lessee has paid rental for the extended period on the entire lease at the rate of \$1 per acre. Only that part of the lands which is within a known producing structure on the date of the expiration of the lease is automatically extended by virtue of the provisions of those acts.

STATUTORY CONSTRUCTION—AMBIGUOUS STATUTORY LANGUAGE—RETROSPECTIVE APPLICATION OF CONSTRUCTION.

The Department's construction of ambiguous statutory language which, on its face, is reasonably susceptible of a contrary interpretation will not be given retrospective application where such application would cause hardship and inequity.

STATUTORY CONSTRUCTION—ACT OF JULY 29, 1942, AS AMENDED DECEMBER 22, 1943, AND SEPTEMBER 27, 1944—OIL AND GAS LEASE—PRODUCING STRUCTURE NOT CLEARLY DEFINED OR REDEFINED IN PERIOD FOR FILING PREFERENCE LEASE APPLICATION—PROTECTION OF LESSEE'S RIGHT TO PREFERENCE LEASE AND EXTENSION OF LEASE.

A lessee of an oil or gas lease who is uncertain whether all or any portion of the lands covered by his lease will fall within the known geologic structure of a producing oil or gas field on the date of the expiration of the lease, and is consequently uncertain whether to apply for a new lease under the act of July 29, 1942 (56 Stat. 726), or to pay rental in order to obtain an extension of his lease under the acts of December 22, 1943 (57 Stat. 608), and September 27, 1944 (58 Stat. 755), with respect to the land in question, may, in order to protect his rights, proceed as though the land in question fell within the scope of both sections.

HARPER, *Solicitor*:

In a memorandum dated October 26 (Las Cruces 028785-L), the Commissioner of the General Land Office has submitted the question whether an oil and gas lease which is partly within a known produc-

ing structure and which has expired may be considered as extended in its entirety under the act of December 22, 1943 (57 Stat. 608, 30 U. S. C. sec. 226b), and the act of September 27, 1944 (58 Stat. 755), if the lessee did not file a preference right application for a new lease for the portion outside the known producing structure prior to the termination of the original lease, but has paid rental for the extended period on the entire lease at the rate of \$1 per acre.

Section 1 of the act of July 29, 1942 (56 Stat. 726, 30 U. S. C. sec. 226b), is as follows:

That upon the expiration of the five-year term of any noncompetitive oil and gas lease issued pursuant to the provisions of the Act of August 21, 1935 (49 Stat. 674), amending the Act of February 25, 1920, and maintained in accordance with the applicable statutory requirements and regulations, the record title holder shall be entitled to a preference right over others to a new lease for the same land pursuant to the provisions of section 17 of the Act of February 25, 1920, as amended, and under such rules and regulations as are then in force, if he shall file an application therefor within ninety days prior to the date of the expiration of the lease. The preference right herein granted shall not apply to lands which on the date of the expiration of a lease are within the known geologic structure of a producing oil or gas field.

The act of 1943 added the following sentence to that section:

The term of any five-year lease expiring prior to December 31, 1944, maintained in accordance with the applicable statutory requirements and regulations and for which no preference right to a new lease is granted by this section, is hereby extended to December 31, 1944.

The act of 1944 amended the last sentence of the 1942 act, added in 1943, to read as follows:

The term of any five-year lease expiring prior to December 31, 1945, maintained in accordance with the applicable statutory requirements and regulations and for which no preference right to a new lease is granted by this section, is hereby extended to December 31, 1945.

Inasmuch as the provisions of the 1943 and 1944 acts extend the term of "any 5-year lease * * * for which no preference right to a new lease is granted by" section 1 of the 1942 act, a resolution of the question posed requires an interpretation of section 1 of the 1942 act to ascertain whether the phrase "lands * * * within the known geologic structure of a producing oil or gas field" in the second sentence means (1) "a lease all of whose lands are within a known producing structure and only such a lease," or (2) "a lease any part of whose lands are within a known producing structure," or (3) "such part of the lands embraced in a lease as is within a known producing structure." The first and second constructions would treat all of the lands subject to a lease as an indivisible unit to which a preference right to a new lease is applicable entirely or not at all. The third construction would consider the lands subject

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to a lease as an entity severable into portions and would grant a preference right only with respect to that portion which is outside a known producing structure on the date the lease expired.

Under the first interpretation, a preference right to a new lease would be granted with respect to all of the lands subject to the old lease, even though part of such lands is within a known producing structure on the expiration date of the old lease, the extension provisions of the 1943 and 1944 acts would be inapplicable to the entire leasehold, and the whole lease would terminate at the end of the 5-year period.¹ Under the second interpretation, a preference right to a new lease would be denied with respect to all of the lands subject to the old lease merely because a portion of such lands is within a known producing structure on the date of expiration of the lease and, by virtue of the 1943 and 1944 acts, the term of the entire leasehold would be automatically extended to December 31, 1944, and December 31, 1945, respectively. Under the third construction, a preference right to a new lease would be granted only with respect to such part of the lands embraced by the old lease as is outside a known producing structure on the expiration date of the lease, a preference right would be denied as to that portion which is within a known producing structure on that date, and the 1943 and 1944 acts would extend the old lease only with respect to the latter portion.

I. Although the statutory language is not entirely unequivocal, I am of the opinion that a literal interpretation of the statute and what appears to be established congressional and departmental policy with respect to the granting of preference rights to oil and gas leases compel the adoption of the third construction. Accordingly, I have concluded that—

(1) Section 1 of the act of July 29, 1942 (56 Stat. 726, 30 U. S. C. sec. 226b), grants a preference right to a new lease only with respect to that portion of the lands which is outside a known producing structure on the date of the expiration of the lease.

(2) If no application for a preference right is made with respect to such portion prior to the expiration of the lease, the lease on such portion, if non-productive, is terminated at the end of the 5-year period.

¹It will be assumed in this memorandum that none of the lands subject to a lease produce oil or gas in paying quantities. If the lands are productive, the lease continues beyond the 5-year period by virtue of the basic leasing statute (section 17, act of February 25, 1920, as amended by the act of August 21, 1935, 41 Stat. 443, 49 Stat. 676, 30 U. S. C. sec. 226), which provides: "Leases issued after August 21, 1935 under this section shall be for a period of five years and so long thereafter as oil or gas is produced in paying quantities when the lands to be leased are not within any known geological structure of a producing oil or gas field, * * *."

It will also be assumed that the lessee has failed to file a preference right application for a new lease with respect to any of the lands subject to the lease.

(3) A lease of lands which are partly within a known producing oil and gas structure on the date of the expiration of the lease is not extended in its entirety under the act of December 22, 1943 (57 Stat. 608, 30 U. S. C. sec. 226b), and the act of September 27, 1944 (58 Stat. 755), even though the lessee has paid rental for the extended period on the entire lease at the rate of \$1 per acre. Only that part of the lands which is within a known producing structure on the date of the expiration of the lease is automatically extended by virtue of the provisions of those acts.

The first sentence of section 1 of the 1942 act grants a preference right to the record titleholder of an expiring 5-year noncompetitive oil and gas lease over others to a new lease "for the same land" if an application for a new lease is filed within 90 days prior to the date of the expiration of the lease. Considered alone, this provision may be construed to grant a holder of a 5-year lease a preference right to a new lease on all of the land subject to the 5-year lease, regardless of whether any part of it is, on the date of the expiration of the lease, within a known producing structure. But the provision is qualified by the next sentence which provides that—

The preference right herein granted shall not apply to *lands* which on the date of the expiration of a lease are within the known geologic structure of a producing oil or gas field.

The preference right is made inapplicable to "lands" subject to a lease rather than to the "lease" itself.² Thus, it would appear that the new lease to which a preference right is granted is to cover "the same land" as the old lease except to the extent that such "lands" are within the known producing structure on the date of the expiration of the old lease. With respect to the latter lands, no preference right is granted. A literal construction of the section, therefore, points to the conclusion that, in determining whether a preference right to a new lease is granted, the land subject to the old lease is to be considered not as an indivisible unit, but rather as consisting of two severable parcels—one within and the other without a known

² Inasmuch as the preference right under the 1942 act is made inapplicable to "lands" subject to a lease rather than to the "lease" itself, the Department's opinion (56 I. D. 174, 195) that an oil and gas lease is an indivisible unit for the purpose of a statutory provision (section 39, Mineral Leasing Act of February 25, 1920, 41 Stat. 437, as amended by act of February 9, 1933, 47 Stat. 798), suspending acreage rental during a period of suspended operations "under any * * * lease" is inapposite.

Section 39 of the Mineral Leasing Act, considered in that opinion, provided as follows: "In the event the Secretary of the Interior * * * shall direct or shall assent to the suspension of operations * * * under any lease granted under the terms of this Act, any payment of acreage rental prescribed by such lease likewise shall be suspended * * *."

The Department construed that provision as having "reference only to the suspension of operations or production on the lease as a whole," and, accordingly, determined that relief from the payment of rental might not be permitted under that section for a non-producing portion of such a lease while production continued on another portion, or for a portion of leased acreage which was not included in a unit plan.

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producing structure on the date of the expiration of the old lease. Thus, a preference right to a new lease cannot be denied with respect to all of the lands embraced within a lease merely because part of such lands, on the expiration date of the lease, is within a known producing structure. Nor in such a case is a preference right to a new lease granted with respect to all of the lands subject to the lease; it is denied to that part which is within a known producing structure when the lease expires.

This interpretation is consistent with the policy of the Department to construe provisions granting a preference right to oil and gas leases strictly in favor of a denial of the right where a case is not clearly within the scope of such a provision (see *John F. Richardson and Charles F. Consaul*, 56 I. D. 354, 357-358 (1938);³ *George O. Vournas*, 56 I. D. 390 (1938)). That policy effectuates the congressional philosophy revealed in the basic leasing act (act of February 25, 1920, as amended by the act of August 21, 1935, 41 Stat. 437, 49 Stat. 674, 30 U. S. C. sec. 226) of requiring competitive bidding for oil and gas leases in order to afford the Government an opportunity of obtaining a larger consideration for such leases, except where it is clearly provided otherwise and a case is manifestly within

³ In the *Richardson* case, the Secretary affirmed the denial of applications for leases without competitive bidding filed under the following section of the leasing act, pursuant to which the original 5-year noncompetitive leases involved in the instant case were issued (act of February 25, 1920, as amended by the act of August 21, 1935, 41 Stat. 437, 49 Stat. 674):

"All lands subject to disposition under this Act which are known or believed to contain oil or gas deposits, except as herein otherwise provided, may be leased by the Secretary of the Interior * * * to the highest responsible qualified bidder by competitive bidding under general regulations. * * * That the person first making application for the lease of any lands not within any known geologic structure of a producing oil or gas field who is qualified to hold a lease under this Act * * * shall be entitled to a preference right over others to a lease of such lands without competitive bidding * * *."

Applicants contended that they were entitled to a preference right without competitive bidding because the lands were not within a known geologic structure of a producing oil or gas field. In overruling this contention, the Secretary said:

"It is manifestly in the public interest that as a general rule oil leases of public lands be granted by competitive bidding rather than to the first applicant. The consideration received by the Government is greater and the possibility of favoritism and collusion is minimized. The broad authority granted to the Secretary at the outset of section 17 incorporates that general rule. * * * The only exception * * * is in that portion of section 17 which provides that 'a preference right over others to a lease without competitive bidding' shall be granted to 'the person first making application for the lease of any lands not within any known geologic structure of a producing oil or gas field.' Congress has formulated the general policy that competition and the greater public benefit are to be preferred. * * * I think that the finding that lands attempted to be leased without competition are outside a known structure should be based upon clear and convincing evidence. The finding should not be made in the face of substantial doubt.

"In this case, there is no such clear and convincing evidence and there is substantial doubt. * * *"

such an exception (*John F. Richardson and Charles F. Consaul, supra*). It cannot be gainsaid that the provision of the 1942 act which makes a preference right inapplicable to "lands" within a known producing structure on the date of expiration of a lease creates considerable doubt that the act grants a preference right to a new lease of lands which are within a known producing structure on such expiration date merely because, on that date, other lands embraced in the lease are outside of such structure. Accordingly, in the light of the Department's rule of construction in preference right cases, there would seem to be little, if any, justification for adopting an interpretation which would grant a preference right to and dispense with competitive bidding for a new lease of all of the lands subject to the old lease, including such of the lands as are within the boundaries of a producing structure when that lease expires.

The adoption of the first construction—that the preference right is applicable to the entire leasehold even if part of the lands is within a known producing structure on the expiration date of the lease—would constitute a departure from what appears to be the consistent policy of Congress, disclosed in section 17 of the basic leasing act of February 25, 1920, as amended by the act of August 21, 1935 (41 Stat. 443, 49 Stat. 676, 30 U. S. C. sec. 226), of limiting the granting of preference rights to leases of lands not within a known producing structure and requiring competitive bidding with respect to all leases of lands within such structure,⁴ thereby permitting the Government to receive a higher price for leases of the latter lands (*John F. Richardson and Charles F. Consaul*, 56 I. D. 354, 357, 43 CFR sec. 192.21, as amended, 8 F. R. 14624 (October 25, 1943)). And it appears that Congress intended to continue this policy when it enacted the 1942 statute. Thus, in its report to Congress on the 1944 amendment to the 1942 act, which was incorporated in and adopted by the Senate report on the amendment (S. Rept. 1085, 78th Cong., 2d sess.), the Department said:

This bill, if enacted, would further amend section 1 of the act of July 29, 1942 (56 Stat. 726), as amended December 22, 1943 (57 Stat. 608, 30 U. S. C. sec. 226b), so as to extend the life of any 5-year lease expiring on or before

⁴ Thus, the leases to which the provisions of section 1 of the 1942 act are specifically made applicable are leases awarded under section 17 of the 1920 act, as amended by the 1935 act, which were noncompetitive merely because they embraced lands not within any known geologic structure of a producing oil or gas field. Section 17 (act of February 25, 1920, as amended by the act of August 21, 1935, 41 Stat. 443, 49 Stat. 676), provides: " * * * That the person first making application for the lease of any lands *not within any known geologic structure of a producing oil or gas field* who is qualified to hold a lease under this Act * * * shall be entitled to a preference right over others to a lease of such lands without competitive bidding * * *." [Italics supplied.]

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December 31, 1945, for which no preference right to a new lease is granted by that section.

* * * * *

The bill applies to any noncompetitive lease issued in accordance with section 17 of the act of February 25, 1920 (41 Stat. 437, 443), as amended August 21, 1935 (49 Stat. 674, 30 U. S. C. sec. 226), for lands not then within the known geologic structure of a producing oil or gas field which have since been included within such a field by reason of a discovery of oil or gas outside of the area covered by the lease. *In the absence of the extension which this bill would grant, the lands within such leases, upon their expiration, would become subject to lease by competitive bidding.*

There is a strong likelihood that cash bonuses would be obtained if these lands were offered for lease under such conditions. [Italics supplied.]

This expression of the Department's understanding of the effect of the 1942 act, acquiesced in and adopted by Congress, would appear to dissipate any doubt that the congressional purpose in denying a preference right with respect to lands within a known producing structure was to require that a lease of such lands be awarded to the highest bidder at a competitive sale. Resort to such subsequent construction of a statute is, of course, an appropriate means of ascertaining the legislative intent. *Great Northern Ry. v. United States*, 315 U. S. 262, 277 (1942); *Domarek v. Bates Motor Transport Lines*, 93 F. (2d) 522, 525 (C. C. A. 7, 1937). A construction that the 1942 act grants a preference right to a new lease on lands within a known producing structure merely because they are part of a lease which, on its expiration date, also embraces lands that are outside of such a structure would not comport with this salutary congressional policy.

Again, the adoption of the second interpretation—that the preference right is inapplicable to an entire leasehold if any part of the lands are within a known producing structure on the expiration date of the lease—would lead to a patently incongruous result. For, under that interpretation, if only an infinitesimal part of the lands is within a producing structure on the date of the expiration of the lease, the preference right would be applicable to none of the lands, even though Congress clearly intended that it be applicable to “lands” other than those “within a known * * * structure” on the date of the expiration of the lease. A construction which would create such an inconsistency between the provisions of a statute and would produce such an absurd result should be avoided. *Cf. Fleischmann Co. v. United States*, 270 U. S. 349, 360 (1926); *Haggard v. Helvering*, 308 U. S. 389, 394 (1940); *United States v. American Trucking Associations, Inc. et al.*, 310 U. S. 534, 543 (1940).

Nor is there anything in any of the statutes involved herein which would warrant a construction that a lease of lands outside of a known producing structure is extended by virtue of the 1943 and 1944 acts merely because a lessee, who has failed to file a preference right application for a new lease for such lands pursuant to section 1 of the 1942 act, has paid rental at the rate of \$1 per acre on the entire leasehold for a period beyond the expiration date of the lease.

II. However, it appears from the memorandum of the Commissioner of the Land Office and his proposed decision in the Las Cruces 028785 "N" case, which he has submitted for the approval of the Secretary, that the application of the foregoing interpretation to leases which have already expired would result in hardship to a lessee who, seemingly, has construed the lease extension act of 1943 as automatically extending the period of his entire leasehold despite the fact that part of the lands covered by the lease is outside of a known producing structure on the expiration date of the lease, and, accordingly, has neglected to file an application for a preference right to a new lease in accordance with section 1 of the 1942 act in sufficient time to prevent a termination of the lease with respect to that portion. Thus, several lessees have continued to pay rentals at the rate of \$1 per acre on all of the land subject to their leases beyond the termination date of the lease and others have assigned their leases and have entered into operating agreements under the apparent assumption that the whole of the leases was extended by the 1943 amendment.

Inasmuch as the language of the 1942 and 1943 acts is not entirely free from ambiguity and the construction apparently placed upon it by such lessees is not wholly unreasonable, I am inclined to agree with the Commissioner's view, expressed in the Las Cruces decision, that, in order to avoid hardship and inequity, the interpretation adopted by the Department should be given prospective application only and should not be applied to a lease, such as that in the Las Cruces case, whose 5-year term has already expired. Such a lease should be treated as if extended, in accordance with the 1943 act, as amended by the act of September 27, 1944 (58 Stat. 755), to December 31, 1945. Accordingly, I recommend that you approve the decision of the Land Office in the Las Cruces case, subject to the modification that the lease there under consideration be deemed extended to December 31, 1945, rather than to December 31, 1944, by your approval of this memorandum.

I recommend, further, that the regulations be amended to reflect the interpretation adopted herein and to advise lessees of unexpired leases that, if they desire a renewal of their 5-year leases on that part of the leased lands which is outside of a known producing struc-

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ture, they must file applications for a new lease of such lands in accordance with section 1 of the act of July 29, 1942 (56 Stat. 726, 30 U. S. C. sec. 226b). I suggest that 43 CFR 192.14d and 192.14e be amended to read as follows:

Sec. 192.14d. *Preference right of lessee to a new lease.* Pursuant to section 1 of the Act of July 29, 1942 (56 Stat. 726), upon the expiration of the five-year term of any noncompetitive oil and gas lease issued for a period of five years and maintained in good standing under the law and the applicable regulations, the record title holder has a preference right over others to a new lease for the same land pursuant to the provisions of section 17 of the Act of February 25, 1920, as amended (49 Stat. 674, 30 U. S. C. 226), and under such rules and regulations as are then in force, to the extent that such land is outside of a known geologic structure of a producing oil or gas field on the date of the expiration of the lease, provided he files an application therefor within 90 days prior to the date of the expiration of the lease.

The lessee must, within the period beginning 90 days prior to the date of expiration of the lease and ending on the date of expiration, submit an application under oath in accordance with the regulations (43 CFR 192.23; Par. 10, Circ. 1386) accompanied by a proper filing fee (43 CFR 191.5) and the first year's rental, which is at the rate of 50 cents per acre or fraction thereof. (Sec. 32, 41 Stat. 450, 30 U. S. C. 189; Sec. 1, 56 Stat. 726, 30 U. S. C. 226b)

Sec. 192.14e. *Extension of five-year leases.* The Act of December 22, 1943 (57 Stat. 608), extends to December 31, 1944, the term of any five-year lease expiring prior to that date, maintained in accordance with the applicable statutory requirements and regulations, to the extent that it embraces lands which on the date of the expiration of the lease are within a known geologic structure of a producing oil or gas field. The Act of September 27, 1944 (Public Law 442, 78th Congress), [58 Stat. 755] extends to December 31, 1945, the term of any such lease expiring prior to December 31, 1945, on the same conditions.

Inasmuch as the law requires that rentals must be paid annually in advance, no lease will be considered as extended under the provisions of the Acts until rentals are paid to the end of the extension period and compliance has been made with all other statutory requirements and regulations. (Sec. 32, 41 Stat. 450, 30 U. S. C. 189; 57 Stat. 608, 30 U. S. C. 226b; Public Law 442, 78th Congress, 2d sess. [58 Stat. 755])

The adoption of the interpretation set forth in this memorandum may lead to some practical difficulties where a producing structure has not been clearly defined or is redefined in the period during which a preference right application must be filed. The lessee may not know whether to apply for a preference right lease on the chance that the lands will be situated outside of a known producing structure on the termination date of the lease or whether to pay rentals for an extension on the assumption that the lands will be situated within a known producing structure on that date. This practical problem, however, exists to a certain extent now, and it is understood that some lessees have protected themselves by proceeding on

both assumptions. I believe that this procedure might well be formally authorized, especially since it is the definition or redefinition of a structure by an agency of the Department, the Geological Survey, that presents the problem. Accordingly, I suggest that a regulation be adopted to follow the two just set forth and to read as follows:

Sec. 192.14f. *Protection of lessee's right to preference lease and extension of lease.* If the record title holder of any 5-year noncompetitive oil and gas lease is uncertain whether all or any portion of the lands covered by his lease will fall within the known geologic structure of a producing oil or gas field on the date of the expiration of the lease, and is consequently uncertain whether to apply for a new lease under section 192.14d or to pay rental for an extension of his lease under section 192.14e with respect to the land in question, he may, in order to protect his rights, proceed under both sections with respect to the land in question as though it fell within the scope of both sections. Upon the determination of the proper category into which such land falls, it will be considered that the lessee has proceeded under the applicable section of the regulations, and refund will be made to him of any excess in rentals which he may have paid in proceeding under this section.

(Sec. 32, 41 Stat. 450, 30 U. S. C. 189; Sec. 1, 56 Stat. 726, 30 U. S. C. 226b; 57 Stat. 608, 30 U. S. C. 226b; Public Law 442, 78th Congress, 2d sess. [58 Stat. 755])

The Land Office has submitted for your approval the attached proposed amendment of section 192.14e which is designed to reflect the further extension granted to leases by the 1944 act. If you approve the suggested amendments and addition to the regulations set forth, I suggest that the Land Office draft be returned to the Commissioner for revision in accordance with the recommendations here made.

Approved:

OSCAR L. CHAPMAN,

Assistant Secretary.

**AUTHORITY OF THE SECRETARY OF THE INTERIOR TO PERMIT
CONSTRUCTION OF AN AERIAL TRAMWAY ACROSS LANDS
WITHIN THE GRAND CANYON NATIONAL PARK**

Opinion, December 18, 1944

GRAND CANYON NATIONAL PARK—STATUTORY CONSTRUCTION—ACT OF FEBRUARY 26, 1919—ACT OF JANUARY 21, 1895—RIGHT-OF-WAY ACROSS NATIONAL PARK LANDS.

Section 5 of the act of February 26, 1919 (40 Stat. 1175, 16 U. S. C. sec. 221), does not authorize the issuance of a permit to construct an aerial tramway across a portion of the Grand Canyon National Park where such a tramway would mar the Park's scenic beauty. And any privilege which

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the owner of mining property within the Park may have had under the act of January 21, 1895 (28 Stat. 635, 43 U. S. C. sec. 956), to apply for a permit to use a tramroad across these lands before they were converted into a national park, expired upon enactment of the act of February 26, 1919.

HARPER, *Solicitor*:

By memorandum of October 16, you [Director, National Park Service] have requested my opinion on the question whether, as a matter of law, you may reject the application of the Havasu Lead and Mining Company of Supai, Arizona, for a permit to construct, operate and maintain an aerial tramway across a portion of Grand Canyon National Park for the purpose of transporting ore extracted from its mining property in Havasu Canyon, within the Park. Your memorandum states that the company is at present transporting ore partly by its own pack animals and partly by contract with local Indians; that the company claims that the cost of present operations is practically prohibitive, there being a scarcity of proper pack animals, pack saddles and experienced packers; and, that in order to expedite the removal of ore and to effect operating economies, the company wishes to construct and operate the proposed tramway, one terminus of which is to be located on the company's mining property within the Park, and the other to be located on national forest lands, with intermediate towers for the support thereof to be constructed on park lands. Inasmuch as such a tramway would greatly mar the scenic beauty of this Park and adversely affect its other features, you are opposed to granting this application.

Although your memorandum does not specify when this applicant's interest in the Havasu Canyon mining property accrued, it is my opinion that its present application must be rejected by the National Park Service. I find no legal authority for the issuance of a permit to construct and operate such a tramway, whether the applicant's interest in mining property within the Park vested before or after establishment of the Park. I shall discuss the principles applicable to each case.

In so far as the applicant is seeking to secure a permit to construct an aerial tramway on and over national park lands, it is seeking to acquire rights in and to public lands. By virtue of Article IV, section 3 of the Constitution, vesting in Congress the power to dispose of the territory and property belonging to the United States, private rights in the public lands can be acquired only by virtue of some law of Congress. *United States v. Utah Power and Light Company*, 209 Fed. 554. Hence, the first question here is whether any statute

authorizes the Department of the Interior to permit construction and operation of such a tramway on these national park lands.

The act of February 26, 1919 (40 Stat. 1175, 16 U. S. C. sec. 221), changed the designation of the Grand Canyon National Monument¹ to the Grand Canyon National Park and reserved and withdrew "from settlement, occupancy, or disposal under the laws of the United States and dedicated and set apart as a public park for the benefit and enjoyment of the people," the public lands embraced therein. Section 4 of that act provided in part:

That nothing herein contained shall affect any valid existing claim, location, or entry under the land laws of the United States, whether for homestead, mineral, right of way, or any other purpose whatsoever, or shall affect the rights of any such claimant, locator or entryman to the full use and enjoyment of his land. * * *

Section 5 provided:

That whenever consistent with the primary purposes of said park, the Act of February fifteenth, nineteen hundred and one, applicable to the locations of rights of way in certain national parks and the national forests for irrigation and other purposes, and subsequent Acts shall be and remain applicable to the lands included within the park. The Secretary of the Interior may, in his discretion and upon such conditions as he may deem proper, grant easements or rights of way for railroads upon or across the park.

If this applicant's interest in the Havasu Canyon mining property vested after the park's establishment, its right to a right-of-way over park lands is governed by section 5 of the act of February 26, 1919, *supra*. Neither that section, the act of February 15, 1901 (31 Stat. 790, 16 U. S. C. secs. 79, 522), which by that section is expressly made applicable to Grand Canyon National Park lands, nor any subsequent statute, purports to authorize the issuance of permits to use rights-of-way through national park lands for tramroads, aerial or otherwise. Hence, the applicant could not lawfully be issued a permit in such case.

Moreover, section 5 of the act of February 26, 1919, *supra*, restricts the issuance even of permits to use rights-of-way for which statutory authority exists, to those which are consistent with the primary purposes of the Grand Canyon National Park. Your memorandum states that the scenic resources of Havasu Canyon, considered the most beautiful tributary canyon entering Grand Canyon, as well as other features of the Park, would be affected adversely by the construction, operation and maintenance of the tramway. It follows that the tramway would not be consistent with the primary purpose

¹ Established on January 11, 1908, by Executive proclamation (35 Stat. 2175), pursuant to the act of June 8, 1906 (34 Stat. 225, 16 U. S. C. sec. 431).

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of the Park and that the application of the permit could not be granted under section 5.²

If, on the other hand, this applicant's interest in the Havasu Canyon mining property vested at a time when the present park lands were unreserved public lands, its right to a permit to use a right-of-way over such lands prior to the park's establishment is governed by the act of January 21, 1895 (28 Stat. 635, 43 U. S. C. sec. 956), which is the only statute to authorize the use of rights-of-way over the public lands for tramroads. The relevant portion of that act reads as follows:

The Secretary of the Interior is authorized and empowered, under general regulations to be fixed by him, to permit the use of the right of way through the public lands of the United States not within the limits of any national forest, park, military or Indian reservation, for tramroads, * * * by any citizen or any association of citizens of the United States engaged in the business of mining. * * *

Under this provision, so long as the lands now embraced in the Grand Canyon National Park were unreserved public lands, the present applicant and others engaged in the mining business had the privilege, thereby conferred, of applying for permission to use rights-of-way through those lands for tramroads. This applicant, however, did not apply for a permit to construct an aerial tramway over these lands until after they had been reserved by Congress for a national park. At that time, since the 1895 act specifically excepts "any national * * * park" lands, the privilege thereby conferred no longer applied.

Consequently, whether this applicant's interest in mining property located within the Grand Canyon National Park vested on a date prior to the Park's establishment or on a date subsequent thereto, there is no legal authority for the issuance to it by the National Park Service of a permit to construct, operate and maintain an aerial tramway across these national park lands.

**WILLIS J. LLOYD, APPLICANT
OSCAR JONES, PROTESTANT**

Decided December 21, 1944

PRIVATE EXCHANGE UNDER TAYLOR GRAZING ACT—PROTEST—COLOR OF TITLE—
ENCLOSURE—CHARACTER OF RIGHTS ON FEDERAL RANGE BEFORE AND UNDER
TAYLOR GRAZING ACT.

A protest against a private exchange application under section 8 of the Taylor Grazing Act is without merit:

²That the Park's scenic beauty is its "primary purpose," see 57 Cong. Rec., pt. 2, pp. 1769-1770, 65th Cong., 3rd sess. (January 20, 1919).

1. Where a protestant alleging that for more than 50 years the land in the selection has been occupied, used and in part fenced in with his family ranch, first by protestant's father and then by himself, "adversely to all the world and under a claim of right" makes no showing regarding the part enclosed of any compliance at any time with the requirements of the Unlawful Inclosures Act of February 25, 1885 (23 Stat. 321, 43 U. S. C. sec. 1062);
2. Where protestant claims a right to purchase all said lands under the Color of Title Act and prays to be allowed to do so but upon being advised of the procedure to follow fails to file an application for purchase making the required showings;
3. Where protestant also asserts that on numerous occasions he tried to obtain title to the selected lands and was unable to do so, but where departmental records show that neither protestant nor his father has ever applied to the United States for any form of entry or purchase of these lands;
4. Where despite assertion of peaceful, adverse possession of all these lands for over 50 years neither protestant nor his father ever filed with the Government any objection to the several applications for them recognized by the Government during that period or to the appropriation made of them by a homestead entry existing from 1918 to 1924;
5. Where protestant has at no time initiated any action to establish or protect any existing valid right which he may have thought himself to possess in these lands;
6. Where at the same time that he asserts color of title to these lands protestant makes an incompatible offer to exchange base lands for the selection;
7. Where protestant has acquired no right in or on the lands of the unenclosed portion of the Federal range in the selection through pasturing his livestock thereon, inasmuch as neither before nor since approval of the Taylor Grazing Act has Federal policy or law permitted such use to create any right to the lands or to their exclusive occupancy when as here they are part of a "common use area" for which several individuals have permits.

CHAPMAN, *Assistant Secretary*:

Willis J. Lloyd of Almo, Idaho, on November 3, 1941, made application, Blackfoot 054095, under section 8 of the Taylor Grazing Act for an exchange of lands in Idaho Grazing District No. 2 as follows:

Base lands:

T. 15 S., R. 25 E., B. M., Idaho,

Sec. 22, W $\frac{1}{2}$ NE $\frac{1}{4}$;

Sec. 26, SW $\frac{1}{4}$ NW $\frac{1}{4}$;

120 acres.

Selected lands:

T. 15 S., R. 25 E., B. M., Idaho,

Sec. 33, SE $\frac{1}{4}$ SE $\frac{1}{4}$;

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Sec. 34, S $\frac{1}{2}$ SW $\frac{1}{4}$;

120 acres.

On August 21, 1944, Lloyd amended his selection of Sec. 34, S $\frac{1}{2}$ SW $\frac{1}{4}$ to SW $\frac{1}{4}$ SW $\frac{1}{4}$, thereby reducing his selection of 120 acres to 80 acres.

On April 25, 1942, Oscar Jones filed a protest against approval of the exchange. Field investigation was had. On January 11, 1944, the Assistant Commissioner of the General Land Office dismissed the protest. On January 31, 1944, Jones filed a notice of appeal from this dismissal.

The Jones protest made the following allegations:

1. That about half of the selection, together with certain adjoining lands now owned by the First Trust Company of St. Paul, Minnesota, Trustee, is enclosed within a fence.

2. That this fence was built by protestant's father many years ago when he owned the lands adjoining on the south; that it is now being kept in repair by protestant; and that the portion of the fence which is on the selected lands is worth about \$240.

3. That for more than 50 years the enclosed portion of the selection has been used by the trust company's predecessor in interest¹ in the adjoining lands mentioned and by protestant, "adversely to all the world and under a claim of right."

4. That in 1932 protestant entered into a contract with the trust company to purchase from it the lands adjoining the selection on the south and that he will acquire the title thereto when the purchase price shall have been fully paid.

5. That ever since 1932 Jones has been using for hay production and grazing those portions of the selection within the fence which lie along the bends of the Raft River; that approval of the Lloyd selection would deprive Jones of this use, would require removal of the fence and would reduce the area used by Jones.

6. That on numerous occasions protestant has tried to obtain title to the selected lands but as yet has been unable to do so.

7. That protestant has a superior and prior right to the use of the 120 acres selected and, upon information and belief, that he is entitled to purchase these 120 acres under the Color of Title Act of December 22, 1928 (45 Stat. 1069, 43 U. S. C. sec. 1068, 1068a). Protestant Jones therefore prayed that Lloyd's application be denied and that protestant be allowed to purchase the lands sought by Lloyd.

¹ According to Jones' statements to the field examiner, this "predecessor in interest" seems to have been Jones' father.

Upon receipt of this protest the register immediately advised Jones that his protest could not be considered as an application for purchase under the Color of Title Act of December 22, 1928 (45 Stat. 1069, 43 U. S. C. sec. 1068), and that if Jones wished to file such an application he must comply with the instructions in Circular 1186.² The register enclosed the circular and stated that an application, if filed, would be held suspended until final adjudication of Lloyd's Exchange Application. To date no such application has been filed.

Upon investigation in the field Jones was interviewed by the examiner and elaborated some of the statements in his protest. He said that for many years his father had owned the land adjoining the selection on the south but had lost it and that protestant is now repurchasing the land upon contract; that during his father's ownership the Jones Ranch had used the selected land and harvested its hay and that in 1942 protestant had cut this hay. Protestant stated that he made his living by farming and also by teaching school in the Almo area. He is not reported as saying that he owned any sheep or as describing the kind or numbers of any livestock that he owned or ran as part of his farming. He declared that he would be glad to offer to the United States in exchange for the selection base lands which he believed would be acceptable to it and he also stated that he would be glad to go to hearing to prove that the selection was part of the Jones ranch through the years. He did not specify what lands he could offer as base nor did he describe the nature of the right entitling him or his father to fence or claim the selected lands or any part of them.

As to applicant Lloyd, various reports from the field showed that he had been in the sheep business for many years; that he had been grazing a considerable band on the Federal range of the surrounding area and that his grazing privileges on this range were based on his ownership of a considerable acreage to the west. The record also showed that in 1922 applicant Lloyd had bought the relinquishment of a homestead entryman of the selected lands named Laver Adams and thereafter had made considerable use of these lands, harvesting the hay from the natural meadow lying along the Raft River and feeding his sheep on the land in winter. In 1942, according to Lloyd, Jones harvested the hay, beating Lloyd to the crop by cutting it earlier than was normal. But in 1943 Lloyd again cut it, this time only to have it seized by the Grazing Service and stacked to feed Grazing Service saddle horses when in the neighborhood. It

² Code of Federal Regulations, Title 43, sec. 140.1-140.17.

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also appeared that although Lloyd and Jones had once been associates in the sheep business their relations had deteriorated into enmity.

Upon due consideration of the record, the Land Office dismissed the Jones protest as without merit. Its findings were that applicant Lloyd is successfully operating a considerable band of sheep; that he uses this area for them even during the winter and that he needs this land, while protestant is not now in stock raising substantially but makes his living chiefly by school teaching and farming.

From this dismissal Jones filed a notice of appeal but no appeal brief or argument as required by the Rules of Practice. See Title 43, Code of Federal Regulations, secs. 221.79 and 221.50. His notice contains the following statement:

This appeal is taken on questions of both law and fact and particularly by reason of the erroneous report of the field investigation as set forth in the decision of the Assistant Commissioner, which said report is not a true or correct statement of the respective number of sheep owned by the applicant and the protestant, or the operations of the protestant as is shown by the affidavits that are being submitted herewith.

The affidavits to which the notice refers were made by Wesley B. Ward and H. E. King on January 22, 1944, and were in identical language, the statement signed by King obviously being a carbon copy of Ward's. Both men allege their acquaintance with both Jones and Lloyd. They assert that for a number of years Jones has taught school "during the winter season" but that his principal occupation is stock raising, and that he is engaged in the sheep business, running about 1,000 head of sheep on public domain and private lands; that for more than 10 years he has grazed said sheep on the selected lands during different periods of the year; and that in their judgment the sheep owned by Lloyd "would not exceed between 250 and 300 head." To these allegations Ward adds in long-hand the words "Numbers considered approximate only."

In the consideration of the issues raised by the proceedings and statements above recounted it is desirable to note in the first place certain of the statutes here applicable and in the second place certain facts in the public records concerning the selected tracts. As to the law, the following are pertinent statutes:

(1) The act of February 25, 1885 (23 Stat. 321; U. S. Code, Title 43, sec. 1062), declared unlawful and prohibited any inclosure of public lands to any of which the maker of the inclosure had neither a claim nor color of title made or acquired in good faith nor any asserted right thereto by or under claim *made in good faith with a view to entry thereof and filed* at the proper land office under the general laws of the United States *at the time of the enclosing*. It

also declared unlawful and it prohibited the assertion of a right to the exclusive use and occupancy of any part of the public lands without claim, color of title or asserted right as above specified as to inclosure.

(2) The Color of Title Act of December 22, 1928 (45 Stat. 1069, 43 U. S. C. sec. 1068), as its basic condition required an applicant thereunder to show peaceful, adverse possession by himself, his ancestors or grantors for more than 20 years under claim or color of title.

(3) On November 26, 1934, Executive Order No. 6910 withdrew, subject to existing valid rights, all vacant, unreserved and unappropriated public land in the State of Idaho and 11 other Western States from all forms of entry and disposal and reserved it for classification in accordance with its highest usefulness and in aid of the conservation purposes of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269), later amended by the act of June 26, 1936 (49 Stat. 1976, 43 U. S. C. sec. 315f). Further, by the terms of section 7 of the Taylor Act of 1934 and of the 1936 amendment thereof the withdrawn lands were not to be subject to either settlement or occupation until they should have been duly classified and opened to entry. By the terms of section 8(b) of the same act a different method of disposal was provided. The withdrawn lands were to be subject to private exchange when in the discretion of the Secretary public interests would be benefited by such exchange.

As to the facts of record concerning the selected lands, the Department finds the history of these tracts one of numerous permutations. In the 25 years from 1916 to 1941 no fewer than four persons initiated rights of one sort or another to these lands by applications made in accordance with prescribed legal procedure and duly recognized by the Government. During nearly eight years, from 1916 to 1924, these lands were continuously subject to the rights of three applicants and for over five years were in a homestead entry allowed to one of them but later cancelled. Still later, with passage of the Taylor Act the tracts became reserved lands, subject to restoration to the public domain only upon the specific conditions set forth in point (3) above and subject to private exchange as above described.

In the interest of accuracy and clarity, certain details of the several applications for the lands should be noted. On April 20, 1916, Mrs. Grace E. Walton applied in Hailey 019842 to make desert entry of the 120 acres in question. On August 30, 1917, she filed a relinquishment which was treated as a withdrawal of the application. This relinquishment seems to have been bought by Mrs. Susie E. Hansen, widow of Christian Hansen; for coincidentally with the

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filing of Mrs. Walton's relinquishment, Mrs. Hansen filed Hailey 023466 for desert entry of the same three forties. However, on September 20, 1918, she too signed a relinquishment, filing it on September 23, 1918.

The Hansen relinquishment was apparently for the benefit of Laverne Adams; for on September 20, 1918, Adams filed Hailey 024738 for Homestead Entry of these lands and on September 23, 1918, the day when the Hansen relinquishment was filed, the Government allowed Adams to enter these lands. Adams continued in legal possession of the three tracts for over five years, or until January 5, 1924. On that date his entry was cancelled for lack of final proof. Meantime, however, on September 28, 1922, Adams, like Mrs. Walton and Mrs. Hansen, executed a relinquishment. Unlike their relinquishments, however, that by Adams was not filed immediately but was held for 13 years, or until October 1, 1935, at which date of course it could be of no effect, the Adams entry having already been cancelled for lack of final proof (January 5, 1924).

The Adams relinquishment in 1922 was made, the record shows, for the benefit of Willis J. Lloyd, the applicant in the present exchange proceedings. At the time when he bought the Adams relinquishment Lloyd intended to apply for homestead entry of the tracts but for numerous reasons delayed doing so until March 15, 1937. Finally on that date he filed a homestead application, Black-foot 049734, together with a petition for agricultural classification of the tracts and for their restoration to entry, as required by section 7 of the Taylor Grazing Act above cited. On February 12, 1940, this application was rejected on the ground that the tracts were more valuable for the production of native grasses and forage plants than for that of agricultural crops. Lloyd appealed but on November 3, 1941, withdrew his appeal and at the same time filed his present application for an exchange of lands under section 8 of the Taylor Act, above mentioned.

On April 25, 1942, Oscar Jones protested against this exchange in the paper above described. As will be recalled, Jones therein alleged not only that for more than 50 years, or since before 1892, his father first and then he himself had used the enclosed portion of the selection "adversely to all the world and under a claim of right" but further that he had a right to purchase the whole selection under the Color of Title Act and that on numerous occasions he had tried to obtain title to the selected lands but as yet had been unable to do so. See protest allegations 3, 7 and 6, *supra*.

For these statements departmental records contain no support whatever. At no time in its history has the United States Govern-

ment made a grant or patent of these lands to any individual or corporation or in any way whatever alienated its title to them. Nor at any time in the 50 years between 1892 and 1942, spoken of by Jones as a period of adverse possession of these lands, does it appear that Jones or his father ever applied to the United States Government for entry or purchase of these lands under any public-land law whatever.

Nor did they or either of them at the time of the building of the fence and the making of the enclosure described by protestant or at any other time file with the Blackfoot land office in any connection whatever any such showings of title or of a right to make the enclosure or have exclusive occupancy of the selected lands as are required by the Unlawful Inclosures Act above cited. Nor in the 26 years between 1916 and 1942 did Jones or his father file with the Government any protest against any of the several desert-land and homestead applications filed in that period as above described. Nor has Jones initiated any action under the Taylor Grazing Act to establish or protect such existing valid right as he may have thought himself to possess in these lands. Nor finally at any time since April 25, 1942, has Jones, following the advice of the register given under that date and quoted above, filed any application to purchase the lands under the Color of Title Act in the manner prescribed by law.

From all these considerations it is clear that the enclosure of public lands alleged to have been made by protestant's father and maintained by protestant by means of the fence above described was unlawful, no showing of title or right having been made by them at the time of the enclosing. Being unlawful, the enclosure could neither initiate a right in either father or son nor change the character of the lands from public to private lands.

As regards the unenclosed portion of the lands here selected, until approval of the Taylor Grazing Act it was the Government's policy that such public lands, when not under actual settlement, should be freely used by all persons desiring to graze stock thereon. However the use of unenclosed and unoccupied Government lands for pasturing livestock was permissive only; it created no title and could be terminated at any time by withdrawal of the Government's consent thereto. *State v. Bradshaw*, 161 Pac. 710 (1916); *McIlquham v. Anthony Wilkinson Livestock Co.*, 104 Pac. 20 (1909). Since passage of the Taylor Grazing Act the grazing use of public lands within grazing districts is no longer unrestricted but is controlled by the act and the regulations prescribed by the Interior Department and administered by the Grazing Service. Thereunder, no authorized

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use of the range, whether of individual allotment or of common use area, initiates any right to the land or any right at all except that of a limited privilege. Accordingly, neither before nor after passage of the Taylor Act has Jones' use of the Federal range created in him any right to the land. Nor has such use as Jones may have been making of the selected lands since passage of the Taylor Act given him any right to their exclusive occupancy; for, as the Grazing Service reports, these tracts are part of a large "common use area" for the use of which several persons have permits.

It may be recalled that in his interview with the field examiner Jones not only declared his willingness to go to hearing to prove that the selection was part of the Jones ranch but also expressed his willingness to exchange base lands for the three tracts here in question. The incompatibility of the two courses is obvious and the suggestion of a possible exchange throws some doubt upon the good faith of Jones in alleging a right to the lands under color of title. It may also be noticed in passing that allegation 4 in Jones' protest, *supra*, is not strictly accurate or complete. According to the records of Cassia County, Idaho, it is not Oscar Jones but his brother, R. M. Jones, who has contracted with the First Trust Company of St. Paul, Minnesota, for purchase of the lands south of the selection and once owned by their father.

In view of all the circumstances and statutes above set forth, the Department regards as of no importance the issues raised on appeal concerning protestant's chief occupation and the number of sheep run by applicant and protestant respectively and can only conclude that the Assistant Commissioner of the General Land Office was correct in holding the Jones protest without merit.

The decision to dismiss the protest is

Affirmed.

RECOMMENDATIONS TO CONGRESS BY SECRETARY OF THE INTERIOR CONCERNING STRATEGIC MINERALS AND METALS

Opinion, December 22, 1944

SECRETARY OF THE INTERIOR — ARMY AND NAVY MUNITIONS BOARD — SURPLUS PROPERTY ACT OF 1944 — STRATEGIC WAR MATERIALS ACT — STATUTORY CONSTRUCTION.

The Surplus Property Act of 1944 (58 Stat. 765), requires the Secretary of the Interior to participate jointly with the Secretary of War and the Secretary of the Navy in making recommendations to Congress, through the agency of the Army and Navy Munitions Board, respecting the maximum and minimum amounts of each strategic mineral or metal which

should be held in the stock pile authorized by the Strategic War Materials Act (act of June 7, 1939, 53 Stat. 811, 50 U. S. C. sec. 98 *et seq.*)

HARPER, *Solicitor*:

By a memorandum dated December 13, Assistant Secretary Straus requested my opinion concerning your [Secretary of the Interior] responsibility under section 22(d) of the Surplus Property Act of 1944 (58 Stat. 765), to participate in the preparation of recommendations to Congress by the Army and Navy Munitions Board "respecting the maximum and minimum amounts of each strategic mineral or metal which in its opinion should be held in the stock pile authorized by the act of June 7, 1939" (53 Stat. 811, 50 U. S. C. sec. 98, *et seq.*), popularly known as the Strategic War Materials Act.

It is my opinion that the reference in section 22(d) of the Surplus Property Act of 1944, *supra*, to the Army and Navy Munitions Board means that the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior, acting jointly through the agency of the Army and Navy Munitions Board, are to submit the required recommendations.

Section 22(d) of the Surplus Property Act of 1944, *supra*, provides as follows:

Within three months following the enactment of this Act the Army and Navy Munitions Board shall submit to Congress its recommendations respecting the maximum and minimum amounts of each strategic mineral or metal which in its opinion should be held in the stock pile authorized by the Act of June 7, 1939. After one year from the submission of such recommendations, unless the Congress provides otherwise by law, the Board may authorize the proper disposal agencies to dispose of any Government-owned accumulations of strategic minerals and metals including those owned by any Government corporation when determined to be surplus pursuant to this Act.

The Army and Navy Munitions Board was originally created in 1922 by joint action of the Secretary of War and the Secretary of the Navy and has functioned in various capacities under their direction for a number of years, apparently without any congressional authorization. When Congress passed the Strategic War Materials Act in 1939, it provided as follows:

Sec. 2. To effectuate the policy set forth in section 1 hereof the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior, acting jointly through the agency of the Army and Navy Munitions Board, are hereby authorized and directed to determine which materials are strategic and critical under the provisions of this Act and to determine the quality and quantities of such materials which shall be purchased within the amount of the appropriations authorized by this Act. In determining the materials which are strategic and critical and the quality and quantities of same to be purchased the Secretaries of State, Treasury, and Commerce shall each designate repre-

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sentatives to cooperate with the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior in carrying out the provisions of this Act.

Since the passage of this act, the Secretary of War, the Secretary of the Navy, and the Secretary of the Interior have jointly, as provided by law, cooperated in determining what metals and minerals are strategic and critical and the quantity of such metals and minerals to be purchased. This determination has been made by a so-called committee of the Board but has always been approved by the Secretaries jointly or by their representatives and it is clear that the responsibility under the 1939 act is definitely that of the three Secretaries. No indication has been found in the Surplus Property Act of 1944 or in any other legislation that Congress intended to change this responsibility.

When the stock-piling provisions of the Surplus Property Act were adopted, Congress provided in section 22(a) for the inclusion of fabricated articles whose principal components by value consist of strategic minerals and metals "but shall not include such fabricated articles as the Army and Navy determine are not suitable for their use in the form in which fabricated and which may be disposed of commercially at value substantially in excess of the metal market price of the component minerals and metals of such fabricated articles." Section 22(c) of the act also provides for the stock piling of strategic materials other than strategic minerals or metals, specifying, however, that their amounts and designations should be determined by the Army and Navy. So far as metals and minerals, other than fabricated articles containing them, are concerned, the act speaks only of the Army and Navy Munitions Board, and in section 22 alone there are four references to the 1939 act relating the Board to its activities under the latter act.

Section 22(a) of the Surplus Property Act declares, among other things, that certain minerals and metals "shall be added to the stock pile authorized by the Act of June 7, 1939 * * * and shall be subject to its provisions." The Secretary of the Interior called attention in his testimony on August 16, 1944, in the hearings on the utilization and disposition of surplus war property before the Senate Military Affairs Committee,¹ to his participation in the control of strategic minerals and metals. Section 22 does not relieve the Secretary of the Interior of his responsibility as one of the principals acting through the agency of the Army and Navy Munitions Board when it acts with respect to strategic minerals and metals, although it is clear that the Secretary of War and the Secretary of

¹ Hearings, p. 1019.

the Navy may, without the participation of the Secretary of the Interior, deal with other strategic materials. Moreover, Congress was asked by the War Department's representative at the hearings to adopt a provision which would have required the Secretary of War and the Secretary of the Navy (excluding the Secretary of the Interior altogether), acting through the Army and Navy Munitions Board, to develop programs for stock piles of all strategic and critical materials and to file such programs with the Surplus Property Administrator and to submit them to Congress.² This recommendation of the War Department was not adopted. It is also important to note that in section 22(c) Congress specifically approved of a list of strategic and critical materials compiled by the Army and Navy Munitions Board. This list was made up with the concurrence of the Secretary of the Interior,³ as were all other similar lists of strategic and critical minerals and metals since the adoption of the Strategic War Materials Act.⁴

It seems clear, therefore, that Congress not only did not change the principals, i.e., the three Secretaries, for whom the Board was to act, insofar as metals and minerals were concerned, but it actually refused to make such change and approved, in the Surplus Property Act, the work of the Board made on this joint basis. Thus the Secretary of the Interior remains jointly responsible, with the Secretary of the Navy and the Secretary of War, for the compilation of further lists of strategic and critical minerals and metals under the 1939 act, which, with an amendment not material to this discussion (act of May 28, 1941, 55 Stat. 206, 50 U. S. C. sec. 98(e)) is still in effect except as modified by the Surplus Property Act of 1944, and also for submitting recommendations to Congress under section 22(d) of the latter act. This is in accordance with the original intent of Congress in setting up this work through the agency of the Army and Navy Munitions Board. No indication has been found that Congress intended to exclude the Secretary of the Interior from being one of the principals acting through the agency of the Board for this purpose. Therefore it is presumed that the congressional intent was not to make any change in this respect.

² Hearings, August 17, 1944, p. 1165.

³ See "Current list of strategic and critical materials," dated March 6, 1944, classified "confidential."

⁴ See identical letters dated August 7, 1939, from the Acting Secretary of the Interior to the Assistant Secretary of War and the Assistant Secretary of the Navy calling attention to the fact that "in view of the provisions of Section 2 of the Act it would seem to be appropriate to have a formal statement of approval of these lists in a single document carrying the signatures of the Secretaries of War, Navy, and Interior." See, also, "Revised list of strategic and critical materials," dated January 30, 1940, signed by the Acting Secretary of War, the Secretary of the Navy, and the Secretary of the Interior.

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Inasmuch as it is the duty of the Secretary of the Interior to take joint action with the Secretary of War and the Secretary of the Navy in making the recommendations to Congress respecting the maximum and minimum amounts of each strategic mineral or metal which should be held in the stock pile authorized by the act of June 7, 1939, *supra*, a dissenting Secretary may, of course, submit to Congress his dissenting opinion.

Approved:

MICHAEL W. STRAUS,
Assistant Secretary.

I N D E X

Note.—In the front of this volume are the following tables: (1) Decisions and Opinions reported; (2) Cases cited; (3) Overruled and modified cases; (4) Overruled and modified instructions; (5) Statutes cited; (6) Circulars of the General Land Office; (7) Circulars cited; (8) Executive Orders and Proclamations cited; (9) Instructions cited; (10) Orders, Rules, and Regulations cited; (11) Rules of Practice cited; (12) Reported Solicitor's Opinions cited; (13) Unreported Decisions and Solicitor's Opinions cited; (14) Miscellaneous citations.

Abandonment.

See Mining Claim; Oil and Gas Lands; Taylor Grazing Act and Lands, subheading State Exchanges.

Accretion and Avulsion.

See Public Lands.

Adverse Possession.

See Color of Title.

Adverse Proceedings.

See Homestead, subheading Stock Raising, Final Proof; Mineral Leasing Act, subheading Lands Valuable for Sodium Borates.

Alaska.

See, also, Contracts, subheading Drilling in Alaska, Employment of Canadian Contractors; Hatch Political Activity Act, subheading Alaska, Governor and Secretary of Territory; Oaths, subheading Officers Qualified to Administer in Public Land Cases in United States and Alaska.

Fish Trap Sites; Authority of the Secretary.

1. Pursuant to the authority in section 1 of the act of June 6, 1924 (43 Stat. 464), as amended by the act of June 18, 1926 (44 Stat. 752), the Secretary may issue regulations to limit the number of trap

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Page Alaska—Continued.

Fish Trap Sites; Authority of the Secretary—Continued.

sites that may be occupied by any individual, corporation, concern or combination, and may limit the amount of fish that may be taken, by means of traps, by any individual, corporation, concern or combination. Such regulations are within the authority granted to regulate the extent of fishing and do not contravene the prohibition in the statute against the grant of an exclusive or several right in the maritime public domain. Similar regulations limiting the catch of the individual are commonly found and have been considered by the courts as a proper exercise of the conservation power. However, a regulation to allocate trap sites to individuals would be in conflict with the provision of the statute prohibiting the granting of any exclusive or several right of fishing and is therefore unauthorized _____ 1

Allotments of Federal Range.

See Grazing and Grazing Lands.

Animals.

See National Parks and Monuments, subheading Domestic Animals Trespassing, Impounding and Sale.

Appeals.

See, also, Contest, subheading Appeals, Special Agents, General Land Office; Grazing and Grazing Lands; Homestead, subheading Military Service; Soldiers' and Sailors' Civil Relief Act of 1940, subheading Military Service.

Evidence.

1. Professional papers and bulletins reflecting the opinions of their author on the sodium deposits in dispute, but not offered in evidence before the register, may not be considered as evidence on appeal 426

Arkansas Drainage Districts.

See Drainage.

Arkansas, State of.

See Public Lands, subheading Accretion and Avulsion.

Assessments.

See Contracts, subheading Liquidated Damages; Drainage, subheadings Arkansas, Minnesota; Indians and Indian Lands, subheading Flathead Irrigation Project, Operation and Maintenance Assessments.

Assignments.

See Oil and Gas Lands; Oil and Gas Leases, Indian Lands; Forest Lieu Selections.

Auditing.

See Puerto Rico.

Baca Float Numbered Three, Arizona.

Relief Act of July 5, 1921, According a Certain Selection Right.

1. Unlike Forest Lieu Selection legislation, the Relief Act of July 5, 1921 (42 Stat.

Baca Float Numbered Three, Arizona—Continued.

Relief Act of July 5, 1921, According a Certain Selection Right—Con.

107), in terms *prohibits* assignment of the selection right granted and its treatment as scrip ----- 294

Blackfeet Tribe.

See Oil and Gas Leases, Indian Lands.

Bonneville Power Administration.

See Damage Claims, subheading Property Damage, Blasting; Ramspeck Act, subheading Federal Employees, Field Appointments.

Boundaries.

See Grazing and Grazing Lands.

Branch of Field Examination, General Land Office.

See Oaths.

Bureau of Mines.

See, also, Contracts, subheading Preexisting; Contracts, subheading State Sales and Use Taxes; Inventions, subheading Federal Employees.

Cooperative Agreements; Government Employees Assigned to Cooperative Work; Payment of Salaries While on Leave.

1. The contribution of a private corporation to a joint investigation with the Bureau of Mines cannot be made by paying the salaries of Bureau personnel who are placed on leave without pay and assigned to the joint work while on a leave status. The contribution of the party cooperating with the Bureau may be made by pay-

Bureau of Mines—Continued. Page

Cooperative Agreements; Government Employees Assigned to Cooperative Work; Payment of Salaries While on Leave—Continued.

ment to the Bureau, and may be measured by the salaries and expenses of the Bureau's personnel assigned to the joint work -----

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Engineering Services; Procurement by Agreement With Independent Contractors.

2. The Bureau of Mines may procure the performance of services by a firm of engineers, as independent contractors rather than as Government employees, upon a satisfactory showing of reasons why the services are not to be performed by its own personnel. Lack of time, space, special machinery, and trained personnel may be sufficient reasons for having the work performed by an independent contractor -----

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Exploration Agreements; Option to Government; Strategic Minerals.

3. In order to assure the production of strategic minerals discovered by it, the Bureau of Mines may, in executing agreements for mineral explorations on privately owned lands, include as a condition an option in favor of the United States which will allow an authorized agency of the Government to undertake further development and production of the minerals discovered -----

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Helium Lease; Erection of Improvements on Navajo Lands.

4. The Bureau of Mines is authorized to erect permanent improvements on leased lands pursuant to the act of September 1, 1937 (50 Stat. 885) -----

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Bureau of Reclamation. Page

See Contracts, subheading Unliquidated Damages; Reclamation, subheading Sale of Unproductive Lands; Soil and Moisture Conservation Activities.

Federal Employees.

1. See Damage Claims, subheading Property Damage; Inventions, subheading Royalty Payments.

Canadian Contractors.

See Contracts.

Citizenship.

See Puerto Rico.

Civil Service.

See Ramspeck Act, subheading Federal Employees, Field Appointments.

Civilian Conservation Corps.

See Homestead, subheading Qualifications of Entryman.

Claims Against the United States.

See Contracts; Damage Claims.

Classification of Lands.

See, also, Coal Lands; Forest Lieu Selection Statutes; Indians and Indian Lands, subheading Allotted Lands, Land-Use Classification; Mineral Lands; Mineral Leasing Act; Mining Claim, subheading Land Classified as Coal; Railroad Land Grants; Taylor Grazing Act and Lands.

Requirements Under Section 7 of Taylor Grazing Act.

1. See Forest Lieu Selections.

Coal Lands.

See, also, Mining Claim;
Res Judicata.

Classification, Review.

1. No review of the classification of land as coal land is warranted upon allegations of incompleteness or inadequacy in the examination of the land upon which the classification is founded _____

Discovery of Oil After Classification.

2. When land has been classified as valuable for coal and withdrawn from entry, selection or location for other purposes, the discovery of oil and the issuance of leases do not affect the withdrawal for coal purposes or constitute a finding that the land has no value for coal _____

Code of Federal Regulations.

See Orders, Rules and Regulations, p. LXXVII.

Color of Title.**Color of Title Claimant Protesting Private Exchange Application Under Taylor Grazing Act.**

1. Without merit for neglect of compliance with Color of Title and Unlawful Inclosures Acts and of action to establish and maintain rights thought to be possessed—Color of Title claim incompatible with claimant's exchange offer—Federal range — Unrestricted use terminated by Taylor Grazing Act _____

Colville Indian Reservation.

See Indians and Indian Lands.

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Competitive Bidding.

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See Oregon and California Railroad Grant Lands, subheading Timber Sale Without Competitive Bidding.

Condemnation.

See Indians and Indian Lands, subheading Five Civilized Tribes.

Confederated Salish and Kootenai Tribes, Flathead Reservation.

See Indian Tribes.

Congressional Grants.

See Public Lands, subheading Accretion and Avulsion.

Congressional Investigation.**Scope of Physician's Privilege, Confidential Medical Data; Authority of Congressional Committee.**

1. The privilege of a physician with respect to confidential medical data of a personal character may be asserted in an investigation by a Congressional Committee; such privilege, however, does not extend to general surveys, reports, or other materials in which the personal character of such data is lost _____

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Conservation and Development of Natural Resources.**Comprehensive National Policy.**

1. Implemented by Taylor Grazing Act and general Withdrawal Orders of November 26, 1934, and February 5, 1935 _____ 277-279, 296-298

Constitutional Law.

See, also, Constitution of the United States, p. LXXXIV; Legislation.

1. The Congress may provide for the impounding and sale of domestic animals tres-

754

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Constitutional Law—Continued.

passing on Federal lands in the exercise of its "police power" pursuant to Article IV, section 3, of the United States Constitution -----

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2. Pursuant to Article IV, Sec. 3, Cl. 2, of the Federal Constitution, the Congress may legislate for the protection and regulation of use of all Federal lands -----

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3. By virtue of Article IV, section 3, of the Constitution, vesting in Congress the power to dispose of the territory and property belonging to the United States, private rights in the public lands can be acquired only by virtue of some law of Congress -----

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Constitutionality of Legislation.

See Legislation, subheading Proviso in Appropriation Act Limiting Use of Funds During Service of Designated Executive Officer, Puerto Rico.

Constitutionality of Statutes.

See, also, Puerto Rico.

1. Opinions will not be rendered on the constitutionality of a statute unless statutory duties alleged to be in conflict with constitutional limitations are placed upon the executive department -----

54

Contest.

See, also, Mineral Leasing Act; Mining Claim; Practice and Rules of Practice.

Appeals; Special Agents, General Land Office.

1. Under the Rules on Government Contests (43 CFR 222.13), special agents of the General Land Office do not appeal from registers' de-

Contest—Continued.

Appeals; Special Agents, General Land Office—Continued.

cisions adverse to the Government. Such decisions are merely advisory and are, therefore, reviewed by the Commissioner of the General Land Office as of course -----

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Contracts.

See, also, Bureau of Mines; Indians and Indian Lands, subheading Pueblos, Tribal Contracts; Inventions, subheading Royalty Payments; Secretary of the Interior, Authority, subheading Delegation, Johnson-O'Malley Act.

Conflict with Statute.

1. The terms of a contract which are inconsistent with the express provisions of a statute cannot be permitted to operate in derogation of law -----

608

Departmental Approval of Leases; Effect of Approval as to Form.

2. Departmental approval of a form of contract is not approval of a contract subsequently executed under such form -----

638

Drilling in Alaska; Employment of Canadian Contractors.

3. In the absence of a specific statutory prohibition, there is no legal objection to the employment of Canadian contractors to drill for strategic minerals in Alaska under the act of June 7, 1939 (53 Stat. 811, sec. 7, 50 U. S. C. 98f). The domestic preference act of March 3, 1933 (47 Stat. 1520, 41 U. S. C. 10(b)), is not applicable since the drilling contract is not a contract for the construction, alteration, or repair of a public building or public work -----

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Contracts—Continued.

Page

Liquidated Damages.

DELAY; TERMINATION.

4. The contractor's right to continue delivery under a contract for the furnishing of transformers was terminated by the contracting officer on account of delay in making delivery and because of failure to meet contract specifications: *Held*, (1) that no delay was caused by Government's failure to answer a letter, which it was under no obligation to answer; (2) that delay in delivery by the contractor's chosen supplier, in the absence of a showing that the delay was caused by the execution of defense orders which it was bound to accept and carry out prior to the execution of its contract with the contractor, was not an excusable cause of delay; (3) that the Government was entitled to liquidated damages accrued at the time of a proper termination order; (4) that the Government did not lose its right to liquidated damages after the termination order, since the contract provided for their accrual after termination; (5) that the Government lost no rights by reallocating the contract to the original contractor after termination, but during the period of suspension of the contract, delays could not be allocated or apportioned; (6) that a termination would be premature and constitute a waiver of liquidated damages if timely applications for extensions, which if granted would extend delivery date beyond termination date, were pending at the time_____

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Contracts—Continued.

Page

Liquidated Damages—Continued.

DELAY; WHAT CONSTITUTES "SHIPMENT."

5. An assessment of liquidated damages was made by the contracting officer for a delay of 38 days, 31 days of which was on the basis that delivery to a carloading company did not constitute shipment within the terms of the contract: *Held*, that the action of the contractor, through its subcontractor, in relinquishing all control over the equipment to the carloading company and the prompt movement of the equipment by that company constituted shipment. Liquidated damages for a 31-day delay between actual relinquishment for such shipment and the contract shipment date were properly assessed. The assessment for the additional 7-day period was improper and should be remitted_____

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REMISSION UNDER FIRST WAR POWERS ACT OF 1941.

6. While the Secretary of the Interior may remit liquidated damages, upon a showing that the war effort would be facilitated thereby, under the First War Powers Act of 1941, and Executive Orders 9001 and 9055 promulgated thereunder, an insufficient showing of justification for the exercise of such authority has been made_____

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REMISSION; EXTENSION OF TIME; DIVISIBLE CONTRACT.

7. A contracting officer, if circumstances otherwise warrant such action, properly may proceed to a determination to

Contracts—Continued.

Liquidated Damages—Continued.

assess liquidated damages, to remit such damages if already deducted from payment, or to extend the time for performance under a divisible contract providing for the assessment of liquidated damages for delays in delivery of stenographic transcripts at specified times -----

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UNFORESEEABLE CIRCUMSTANCES; EXTENSION OF TIME.

8. Illness of a contractor's chosen stenographic reporter cannot be regarded as an unforeseeable circumstance justifying an extension of time for performance or the remission of liquidated damages assessed for delay in delivery of stenographic transcripts as specified by the contract -----

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Unliquidated Damages.

DELAY; EXTRA WORK; ADDITIONAL COMPENSATION.

9. A Government construction contractor claimed additional compensation over the agreed contract price because delay in the supplying of timber piling by the Government allegedly disrupted his work program and increased costs for labor, materials, and overhead: *Held*, (1) that the Government is not obligated, in the absence of an express provision in the contract, to do any act so that work contracted for should at all events be completed within the contract time, or so that it can be carried on in the most efficient and least costly manner; (2) that where a contractor

Page Contracts—Continued.

Unliquidated Damages—Continued.

performs within the time specified only the work contracted for, no claim for damages because of alleged extra work may be administratively considered; (3) that even where a contractor shows that he has in fact performed extra work under a contract with the Government, recovery therefor cannot be had unless such work was ordered in the manner prescribed by the contract; (4) that a claim for additional compensation, calculated after the completion of the work under a contract, cannot be allowed in any event, since it is in form a claim for unliquidated damages which administrative officers of the Government are without authority to consider. *Wm. Cramp & Sons v. United States*, 216 U. S. 494, 500 -----

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Preexisting Contracts; Appropriated Funds Available for Payment.

10. A contract made in one fiscal year is a proper basis for payments out of funds appropriated for the following fiscal year (1) when it was entered into after the appropriation act for the second year was passed but before that year began; (2) when it contains an option to renew which, after appropriate inquiry to see that the price has not fallen out of line with competitors' prices, has been exercised; or (3) when, although not containing an option to renew, it appears that it will be more advantageous to the Government to continue under the old contract than to enter into a new one -----

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Contracts—Continued.**State Sales and Use Taxes; Cost-Plus-Fixed-Fee Contract.**

11. The Federal Government is not exempt from the payment of the cost of State sales and use taxes levied upon purchases made by its contractors under a cost-plus-fixed-fee contract although the goods purchased become the property of the Government upon shipment or delivery _____ 411

State Sales and Use Taxes; Avoidance by Designating Contractor Agent of the Government.

12. In the absence of authorizing legislation, the use of purchase order forms by a Government contractor designating him as an agent for the Government is not a suitable means of avoiding the application of State sales and use taxes to purchases by the contractor under the contract _____ 411

Cooperative Agreements.

See Bureau of Mines.

County Roads.

See National Park Service.

Crow Indian Reservation, Montana.

See Oil and Gas Leases, Indian Lands, subheadings Assignments; Extension Beyond Primary Term.

Damage Claims.**Property Damage; Blasting.****NEGLIGENCE; RES IPSA LOQUITUR.**

1. The doctrine of *res ipsa loquitur* is applicable in cases of damage to privately owned property resulting from blasting operations conducted by Government employees and, in the absence of an explanation

Page Damage Claims—Continued.

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Property Damage; Blasting—Con.

by the Government consistent with freedom from negligence, claims for such damage should be allowed and certified to the Congress for payment under the act of December 28, 1922 (42 Stat. 1066, 31 U. S. C. 215) 63

Property Damage; Fire.**DIRECT RESULT; PAYMENT UNDER APPROPRIATION ACT.**

2. Claim for damage to privately owned timber resulting from necessary fires started by Bureau of Reclamation employees during brush-clearing operations, but which became uncontrollable and spread because of high wind, is not allowable under act of December 28, 1922 (42 Stat. 1066, 31 U. S. C. 215), in absence of negligence, but may be paid under appropriation act provision for "damages * * * by reason of the operations of the United States * * * in the survey, construction, operation, or maintenance of irrigation works," since the damage was the direct result of action by Government employees _____ 189

Property Damage; Flooding.**MEASURE OF LIABILITY.**

3. Liability of the Government for damage to privately owned property flooded by its irrigation works is not that of an insurer but is to be determined according to the degree of care required of ordinarily prudent and careful private individuals in like circumstances _____ 397

ACT OF GOD; NEGLIGENCE.

4. Claims for damage resulting from a flood of such un-

Damage Claims—Continued.

Property Damage; Flooding—Con.

precedented volume as to constitute it an act of God, for which the Government is not liable, cannot successfully be asserted on the ground of negligence in failure to construct a detention reservoir of sufficient volume to impound unprecedented and unforeseeable flood waters -----

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Damages, Measure of.

See Trespass.

Death Valley National Monument.

See National Parks and Monuments.

Delegation of Authority.

See Secretary of the Interior, Authority, subheading Delegation.

Descent and Distribution.

See Indians; Indian Tribes.

Ditches, Canals and Reservoirs.

See Indians and Indian Lands, subheading Rights-of-Way, Flathead Reservation; Rights-of-Way.

Diversity Jurisdiction of Federal Courts; Law to be Applied in Common Law Trials.

See Trespass, subheading Measure of Damages and Erie Doctrine.

Drainage.

See, also, President's Authority, subheading Public Lands Acquired for Specific Purpose, Protection from Oil and Gas Drainage.

Drainage—Continued.

Arkansas.

1. Status of certain entered and unentered public lands drained and assessed by certain Arkansas Drainage Districts under Arkansas laws by authority of the Caraway Act of January 17, 1920, companion to the Volstead Act of May 20, 1908—Only compatible State laws adopted—Rights, duties and limitations created—System for satisfaction of liens—Unlike that of the Smith Irrigation Act of August 11, 1916—Liens a valid right barring withdrawal from Caraway entry but not from homestead entry or other forms of disposition—No guarantee of recovery of charges—No financial obligation on United States—No forfeiture of the lands to the State under any law-----

170

2. Arkansas Land Policy Act of March 16, 1939—State Land Commissioner—Jurisdiction—No release of Caraway liens—Taylor Grazing Act applicable -----

170

Minnesota.

3. Status of entered and unentered public and Indian ceded lands drained and assessed under Minnesota laws by authority of the Volstead Act of May 20, 1908—Only compatible State laws adopted—Relation of Taylor Grazing Act, the withdrawal order of February 5, 1935, and the Minnesota Conservation Statutes in aid of distressed drainage districts—Volstead Act rights, duties and limitations—System for satisfaction of liens—Nature of a lien—Liens a valid right barring withdrawal of assessed lands from Vol-

Drainage—Continued.**Minnesota—Continued.**

stead entry but not from homestead entry or other forms of disposition—No financial obligation on United States—No forfeiture of lands to the State under any law_____

Easements.

See Rights-of-Way, subheading Electric Transmission Lines.

Evidence.

See Appeals; Homestead, subheading Stock Raising; Mineral Leasing Act; Practice and Rules of Practice, subheading Contest.

Exchange Rights.

See Forest Lieu Selections.

Exploration Agreements.

See Bureau of Mines.

Federal Common Law.

See Trespass, subheading Measure of Damages and Erie Doctrine.

Federal Employees.

See Bureau of Mines; Damage Claims, subheading Property Damage; Hatch Political Activity Act; Homestead, subheading Qualifications of Entryman; Inventions; Ramspeck Act, subheading Field Appointments.

Federal Power Commission.

See Rights-of-Way, subheading Electric Transmission Lines, Transfer of Right-of-Way; Uniform Accounting System.

Page Federal Range.

Page

Unrestricted Use Terminated by Taylor Grazing Act.

1. See Color of Title.

Federal Range Code.

See Grazing and Grazing Lands; Table, p. LXXXVIII.

Field Examiners, General Land Office.

See Oaths.

Final Proof.

See Homestead, subheading Stock Raising.

Fishing.

See Indians and Indian Lands, subheading Wind River Reservation.

Fish Trap Sites.

See Alaska.

Five Civilized Tribes.

See Indians and Indian Lands; Indian Tribes; Oil and Gas leases, Indian Lands; Secretary of the Interior, Authority, subheading Delegation.

Flathead Indian Irrigation Project.

See Indians and Indian Lands.

Flathead Indian Reservation.

See Indians and Indian Lands, subheading Rights-of-Way; Indian Tribes, subheading Confederated Salish and Kootenai Tribes.

Forest Lieu Selections.

Legislation Re Selections in Lieu of Lands within Forest Reserves.

CHARACTER OF LANDS TO BE SELECTED.

1. The requirements as to the character of the lands to

Forest Lieu Selections—Con.

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Legislation Re Selections in Lieu of
Lands within Forest Reserves—
Continued.

be selected continue under section 7 of the Taylor Grazing Act. Thereunder lands not of the required character are not proper for disposal in satisfaction of an outstanding substitute selection right as accorded by the repeal act of March 3, 1905—272, 277, 278, 296-298

2. The act of June 4, 1897, as amended by the act of June 6, 1900, requires selections of land in lieu of tracts within a public forest reservation to be confined to vacant surveyed nonmineral public lands which are subject to homestead entry—272, 278, 296-303

3. Forest lands valuable only for their timber and too mountainous for farming or grazing if cleared cannot be classified as suitable for homestead entry and therefore are neither subject to selection under forest lieu legislation nor proper for acquisition in satisfaction of an outstanding exchange right under section 7 of the Taylor Act. Further, such lands are affected by a public interest and may not be restored to the public domain for a disposal incompatible with the purposes of the withdrawal of November 26, 1934—272, 278, 279, 297, 298

4. Lands having a mineral classification made by a board of commissioners under authority of the act of February 26, 1895, approved by the Secretary of the Interior and never revoked are *prima facie* mineral lands and as such are not subject to selection under forest lieu legislation or proper

Forest Lieu Selections—Con.

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Legislation Re Selections in Lieu of
Lands within Forest Reserves—
Continued.

for acquisition in satisfaction of an outstanding substitute exchange right under section 7 of the Taylor Act—272, 278, 279

THE SELECTION RIGHT NOT
SCRIP OR A FLOAT BUT A
RIGHT OF EXCHANGE BE-
TWEEN TWO OWNERS; AS-
SIGNMENTS AND PRACTICES
BY SCRIP DEALERS NOT
COURTENANCED; DOUBLE
POWERS OF ATTORNEY.

5. Forest lieu legislation contemplated an exchange of lands between two owners and in the right of selection created an exchange right, not a floating right subject to barter, sale or assignment. The selection right may be exercised only by the owner of the lands relinquished as base for the selection or for him by his duly authorized agent, and only to such owner may patent to the selected land issue. No selection by an assignee will be considered—273, 283, 284

6. The Department has never countenanced the practice of dealers in public land rights treating the exchange right as scrip and assigning it through the use of double powers of attorney. Although without authority to prevent such private assignments, the Department is not obliged to recognize them and does not do so. If an owner of offered lands contracts privately for a prepatent sale of his interest in selected lands, his transferee has no privity with the Government and will not be recognized by it. If the Land Department

Forest Lieu Selections—Con.

Page Forest Lieu Selections—Con.

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Legislation Re Selections in Lieu of
Lands within Forest Reserves—
Continued.

rejects the selection or cancels the right the transferee has no claim on the Government but must look to his vendor through the courts for redress. Nor will the transferor be heard to complain that rejection of his selection or failure of his base has prevented his conveyance of a selection which he has privately sold before acquiring it: *Held*, that where an executor alleges that X, a record owner relinquishing forest reserve lands and making a selection in his own name, acted only in a trust capacity for the benefit of a company dealing in land rights and of the executor's testator, who purchased the selection right involved from the company, and where such executor, whether or not offering proof of his authority to act, applies to withdraw the selection in order to recover the funds invested, the Commissioner of the General Land Office acts correctly in declining to deal with the transferee's estate, in recognizing only the selector of record, in requiring his compliance with the regulations and in canceling the selection upon his default. 273, 283-284, 294, 295, 296

RIGHT OF SUBSTITUTE SELEC-
TION UNDER REPEALER;
CONDITIONS PRECEDENT;
WHEN RIGHT DEFEATED
BY ELIMINATION OF BASE
FROM FOREST RESERVE.

7. A selector of record who for five years fails to comply with regulations requiring the posting and publication of the

Legislation Re Selections in Lieu of
Lands within Forest Reserves—
Continued.

selection and whose selection is canceled for such default and closed three months before repeal of the forest lieu acts is not without fault, has no selection pending at repeal and has no right of substitute selection under the proviso of the repeal act. 273, 280, 286

8. In such case neither the selector of record nor the alleged heirs of his alleged transferee may at any time be heard to claim a right of substitute selection under the repeal proviso but particularly not when, all parties having failed to make avall of appeal procedures or of other measures designed to protect their rights, they petition for the exercise of supervisory authority in regard to the selection after a lapse of 328 months from its cancellation and without any showing of extraordinary emergency or exigency. 273, 280-288

9. Where forest reserve lands which have been relinquished and stand as unsatisfied base for an outstanding valid right of substitute selection under the repeal act are eliminated from the reserve before the exercise of such right, the right falls and there can be no enforcement thereof, the reason for the exchange having ceased to exist. 273, 280, 293

10. A departmental decision which in circumstances such as those above described holds the cancellation of the selection to have been erroneous, overlooks the interim elimina-

Forest Lieu Selections—Con.	Page	Forest Lieu Selections—Con.	Page
Legislation Re Selections in Lieu of Lands within Forest Reserves—Continued.		Legislation Re Selections in Lieu of Lands within Forest Reserves—Continued.	
tion of the base lands from the forest reserve and accords a right of substitute selection is in error and must be recalled and vacated_____	274, 280, 282, 283, 288-290, 292, 293	gressional intent that in the interest of curbing exploitation of national timberlands all lieu selections made after October 1, 1900, be of lands of the restricted character specified by said act and not of the broader character described by the act of June 4, 1897. This limitation is applicable to a substitute selection made under the proviso of the repealer of March 3, 1905, even though the original selection which it replaces may have been under the 1897 act and of lands more broadly defined _____	274, 298-301
SECRETARY OF THE INTERIOR, SUPERVISORY AUTHORITY; OBLIGATION TO OBSERVE STATUTORY DIRECTIVES.		RIGHT OF SUBSTITUTE SELECTION No NEW RIGHT; LIMITATIONS.	
11. In his administration of the public lands the Secretary of the Interior, although having broad discretionary powers in his supervisory capacity, is bound by the terms of the applicable statutes and by the purposes of the withdrawal. He may not substitute for their conditions rules of his own choosing in particular cases. Nothing in the War Powers Acts authorizes the Secretary to determine the propriety of a substitute selection permitted by the repeal act of 1905 by reference to the war and to the capacity of an applicant's transferee to serve the war's purposes rather than by reference to the conditions imposed by the statutes creating and controlling the selection right. Nor does the Government concern itself with the qualifications of a transferee, with whom it has no privity _____	229, 240, 274, 298	13. The proviso of the repeal act of March 3, 1905, creates no new right of exchange but only a right to make a new selection in place of the selection which failed and in exercise of the original right, the quantity of land in the substitute selection to be the same as that in the original selection and no greater, even though additional base, relinquished but never assigned to a specific selection, may remain unsatisfied _____	274, 301-303
CHARACTER OF LANDS IN SUBSTITUTE SELECTIONS PRESCRIBED BY ACT OF JUNE 6, 1900; LEGISLATIVE HISTORY.		ADMINISTRATIVE DIFFICULTIES WHEN BASE INVALIDATED BY RESERVE BOUNDARY CHANGES; PROTECTIVE MEASURES IN ABSENCE OF RELIEF LEGISLATION.	
12. Both the terms and the legislative history of the act of June 6, 1900, show the con-		14. Administration of forest lieu selections has been embarrassed by numerous factors basic among which has been	

Forest Lieu Selections—Con.

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**Legislation Re Selections in Lieu of
Lands within Forest Reserves—
Continued.**

the possibility that changes in forest reserve boundaries made before completion of a selection might invalidate the base offered by eliminating it from the reserve and might also thereby cloud the offeror's title, no permanent relief legislation permitting restoration of invalid base to the prior owner having existed before 1930. Measures taken to protect rights included general rules to effect prompt completion of selections, special rules for cases presenting features for equitable consideration and stringent directions regarding "additional" selections by scrip dealers who made a practice of offering vast tracts of base land by one relinquishment deed and thereafter making their exchange selections piecemeal, in small quantities, and at their leisure _____ 274, 305-310

**SCRIP DEALERS AND SYSTEM
OF "ADDITIONAL SELEC-
TIONS"; WARNING AGAINST
RISKS.**

15. Instructions of March 6, 1900 (29 L. D. 579), warned holders of outstanding base that delay in making additional selections would be at their own risk, such selections being subject to all changes in the reserve boundaries and in the forest lieu laws: *Held*, that a valid right of substitute selection under the repeal proviso replacing an "additional" selection found invalid is itself an "additional" selection and subject to all the risks described _____ 275, 309, 310

Forest Lieu Selections—Con.

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**Legislation Re Selections in Lieu of
Lands within Forest Reserves—
Continued.****SECRETARY'S AUTHORITY TO
ACT SUA SPONTE.**

16. As long as public lands remain under the care and control of the Land Department its power to inquire into the extent and validity of rights claimed against the Government and to correct its own errors does not cease. When alienation of public land is involved, the Secretary may determine every question presented by the case record without regard for the manner in which the case comes before him for determination _____ 275, 304

Forest Lieu Selection Statutes.**Relief Legislation; Repealed to Curb
Abuses by Timber and Land Spec-
ulators and to Conserve Forest
Resources; Repealer's Proviso.**

1. The act of June 4, 1897, though designed to relieve settlers, entrymen and patentees of lands within national forest reserves by permitting exchange of such holdings for outside tracts, found its chief beneficiaries in timber and land speculators and opened the door to gross abuses and frauds in wholesale exchanges of denuded lands in forest reserves for the most heavily timbered lands outside. To end the abuses and to conserve the country's dwindling forest resources, the legislation providing for the exchange right was repealed by the act of March 3, 1905, entitled "An Act Prohibiting the selection of timber lands in lieu of lands in forest reserves." But a saving proviso permitted the completion of pending selections

Forest Lieu Selection Statutes —Continued.	Page	Forest Lieu Selection Statutes —Continued.	Page
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Relief Legislation; Repealed to Curb Abuses by Timber and Land Speculators and to Conserve Forest Resources; Repealer's Proviso—Continued.

found valid and the making of other, or substitute, selections in the place of pending choices found invalid for reasons not the selector's fault. Applicants herein claim a right of such substitute selection under this proviso _____ 227, 232, 233

Some Later Implementation of National Conservation Policies.

2. Various phases of conservation policy later found new implementation in the Taylor Grazing Act of June 28, 1934, and the Executive orders of November 26, 1934, and February 5, 1935. These effected withdrawal of the public lands in 24 States, reserving them for classification, for determination of their highest usefulness and for conservation and development of natural resources. But section 7 of the amending act of June 26, 1936, gave to the Secretary discretionary authority to restore to the public domain for disposal such withdrawn lands as in his opinion meet the prescribed tests and those applicable in the interest of the people and of conservation of natural resources: *Held*, lands selected for satisfaction of an outstanding substitute forest lieu selection right must meet the requirements under section 7 _____ 228, 233, 234, 239, 240

Character of Lands Subject to Substitute Selection Under the Repealer's Proviso and Under Section 7 of the Taylor Grazing Act.

5. Where a right to make a substitute selection exists un-

Character of Lands Subject to Substitute Selection Under the Repealer's Proviso and Under Section 7 of the Taylor Grazing Act—Continued.

der the saving clause of the repealer, the lands selected must meet the requirements of the legislation providing for the right, namely, the act of June 4, 1897, as amended by the act of June 6, 1900, as well as the requirements of section 7 of the Taylor Act: *Held*, 1. That lands selected in satisfaction of an outstanding substitute selection right must be "vacant surveyed nonmineral public lands which are subject to homestead entry * * *" and "proper for acquisition in satisfaction of any outstanding * * * exchange * * * rights * * *"; 2. That lands which are essentially forest lands, unfit for grazing, and so mountainous, rough, rocky and steep that even if cleared of their timber they would be unfit for agriculture and impossible of cultivation cannot be classified as suited or subject to homestead entry; 3. That forest lands which have a value for conservation and also a substantial value for their timber, which are sought only for their timber and the disposal of which might mean immediate liquidation of their portion of this exhaustible natural resource are affected by a public interest and the Secretary has no authority to restore them to the public domain for a disposal in derogation of the purposes of the withdrawal; 4. That the lands here selected, not being subject to homestead entry and

Forest Lieu Selection Statutes —Continued.	Page	Forest Lieu Selection Statutes —Continued.	Page
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Character of Lands Subject to Substitute Selection Under the Repealer's Proviso and Under Section 7 of the Taylor Grazing Act—Continued.

being affected by a paramount public interest, cannot be classified as proper for acquisition in satisfaction of an outstanding substitute selection right and cannot be restored to the public domain for disposal as such public lands; 5. That an isolated tract may not be released for a use contrary to the public interest_____228, 233-235

Title of the Repealing Act; Effect on Character of Land Subject to Substitute Selection.

4. The repealing act of March 3, 1905, is entitled "An Act Prohibiting the selection of timber lands in lieu of lands in forest reserves" but the saving clause is silent as to the character of lands subject to the substitute selection permitted. Whether the title places an additional limitation on the substitute selection, restricting it to lands wholly without timber, is not here decided _____229, 232, 233

Lands Subject to Homestead Entry; Meaning of Term in Land Department Practice and in Act of June 6, 1900.

5. Land Department practice has regarded the use of lands for farming or for agriculture in the broad sense as satisfying the cultivation requirement of the homestead law but has not permitted homestead entry of lands incapable of being rendered cultivable or usable for such farming, for example, lands valuable only for their timber:

Lands Subject to Homestead Entry; Meaning of Term in Land Department Practice and in Act of June 6, 1900—Continued.

Held, that in the act of June 6, 1900, the Congress used the term "subject to homestead entry" in the same way as the Land Department _____229, 234, 236-239

Secretary of the Interior, Supervisory Authority; Discretion Limited by Statutory Rules and the Public Interest.

6. Despite wide powers in his supervisory capacity and large discretion under section 7 of the Taylor Act the Secretary is bound by the applicable statutes and may not substitute for their conditions and the public interest *ad hoc* criteria of his own or an applicant's choosing_____229, 240, 274, 298

A Valid Right of Substitute Selection Recognized as a Property Right; When to be Satisfied.

7. The Department recognizes a valid right of selection or of substitute selection as a property right and will permit its satisfaction when the reason for the exchange continues to exist and when the proper parties comply with the requirements. To refuse approval of a particular selection because it does not meet the legal requirements is neither to repudiate nor to destroy the right. There are no equities to be considered when a selector, disregarding the rules, fails to perform the selection requirements within the period reasonable in the circumstances of his case_____229, 240, 241

Forest Lieu Selection Statutes Page **Grazing & Grazing Lands—Con.** Page
—Continued.

Treatment of Substitute Selection Right as Scrip Risks Defeat of Right by Interim Changes; Laches; No Claim Against Government.

8. One treating a right of substitute selection as scrip and delaying its exercise will not be heard to complain if his right is defeated by interim changes in forest reserve boundaries or in the governing law. Nor will one failing to apply for restoration of his relinquished base be heard to urge that Government possession of the title for 40 years places any obligation on the Government to grant a particular substitute selection. 229, 241, 242

Geological Survey.

See Inventions, subheading Federal Employees, Employment to Invent; Mineral Leasing Act, subheading Public Lands Acquired for Specific Purpose.

Government Contracts.

See Contracts.

Government Employees.

See Federal Employees.

Grand Canyon National Park.

See Rights-of-Way, subheading Aerial Tramway.

Grant by the United States.

See United States.

Grants, Congressional.

See Public Lands, subheading Accretion and Avulsion.

Grazing and Grazing Lands.

See, also, Indians and Indian Lands, subheading Ceded Lands, Taylor Grazing Act.

Licenses.

ALLOTMENTS OF FEDERAL RANGE; AGREEMENTS.

1. Section 6, paragraph (d), of the Federal Range Code provides that "allotments of Federal range will be made to licensees or permittees when conditions warrant, and divisions of the range by agreement or by former practice will be respected and followed where practicable": *Held*, that this provision refers only to the particular areas of range, or the boundaries thereof, upon which a licensee or permittee shall graze his livestock, and does not authorize the substitution of such agreements for the adjudication of applications according to the standards defined elsewhere in the Federal Range Code 193

BASE PROPERTY; DATE OF FILING APPLICATION; DEPENDENCY BY USE.

2. The offer of base property in an application in one grazing district before June 28, 1938, the dead-line date fixed by regulation, is sufficient to preserve such dependency by use as would otherwise have created a qualified demand in another district, although the base property was not offered in the latter district until sometime in 1941 183

BASE PROPERTY; EVIDENCE OF OWNERSHIP OR CONTROL.

3. The Grazing Service should not be required to adjudicate applications for grazing licenses wherein the ownership or control of the base property is indefinite, and in

Grazing & Grazing Lands—Con.

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Licenses—Continued.

such instances it is within the authority of the Grazing Service to withhold the issuance of the licenses until such ownership or control has been satisfactorily shown -----

419

BASE PROPERTY; LAND OR WATER.

4. While a determination whether land or water shall constitute base property in a given instance is a matter of discretion and is not lightly to be disturbed on appeal, a record showing that a particular water was the sole one serving an area of Federal range during the priority period, that such range cannot now be appreciably utilized without the use of such water, that no person other than the one controlling the land upon which the water is located can legally enjoy access to it, and that other waters in the district have been recognized as base property, is insufficient to support a rejection of an application for a license based on such water.-----

419

5. The discretion to be exercised by the Grazing Service in the determination of whether land or water shall constitute base property in a given district is one which will be disturbed only upon a showing that it was arrived at capriciously, arbitrarily, or without adequate knowledge of the existing conditions-----

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BASE PROPERTY; WATER; EXTENT OF PRIORITY.

6. Water developments made subsequent to the priority period cannot affect the rating

Grazing & Grazing Lands—Con.

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Licenses—Continued.

which a water should receive; otherwise licenses or permits based on water would be unstable and subject to defeasance by subsequent water developments -----

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BASE PROPERTY; PARALLEL LANDS.

7. The term "parallel lands," as applied to certain privately controlled lands in grazing districts, must be considered as embracing those lands that are generally of the same character and type as the surrounding Federal range, that is, they are uncultivated and produce the same general types of forage and are physically similar to the surrounding Federal range. In those districts where it has been determined that the Federal range can be used only during a part or certain parts of the year, such lands are not dependent by use-----

686

BASE PROPERTY; YEAR-ROUND OPERATION.

8. The express requirement in section 1, paragraph (a) of the Federal Range Code of 1942 that there be "possession of sufficient land or water to insure a year-round operation * * *" is clearly complemented by the definition of "land dependent by use," which is defined in section 2, paragraph (g) of the Code, in part as "forage land which is of such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it" -----

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PARTICULAR RANGE; AD-		provements—Continued.	
MINISTRATIVE DISCRETION;		improvements on Federal range	
APPEALS.		under section 4 of the Taylor	
9. While an applicant for a		Grazing Act does not in itself	
grazing license cannot demand,		constitute the grant of a right	
as a matter of right, that he		to use the Federal range that	
be licensed in a particular dis-		is within the fence constructed	
trict, since the assignment of		under such permit _____	686
the area of range to be used by			
a licensee is a matter within			
the discretion of the Grazing			
Service, the question of the			
proper exercise of discretion			
may be raised on appeal_____	183	Grazing Service.	
		See Grazing and Grazing	
Carrying Capacity.		Lands.	
10. The carrying capacity of			
lands can be determined only			
by an examination of the			
lands, and the Department			
necessarily will accept the			
findings of the Grazing Service			
in cases where unfairness or			
discrimination is not charged,			
and no effort is made by the			
appellants to state in what			
instances the determinations			
are incorrect or what, in their			
estimation, such determina-			
tions should have been_____	686	Hatch Political Activity Act.	
		Alaska; Governor and Secretary of	
Hearings on Appeal; Procedure.		Territory; Administrative Posi-	
11. The requirement of sec-		tions.	
tion 9(L) of the Federal Range			
Code that a copy of an appeal			
and brief in support thereof			
must be served on each party			
of record, applies only to par-			
ties who are adversaries such			
as appellants and interveners,			
and neither requires the serv-			
ice of appeals on the advisory			
board, or the district or re-			
gional graziers, nor contem-			
plates the filing of a reply brief			
by the latter_____	687	1. Since the Governor and	
		the Secretary of the Territory	
Permits for Construction of Im-		of Alaska are appointed by	
provements.		the President, by and with the	
12. The issuance of a permit		advice and consent of the	
for the construction of im-		Senate, and since their salaries	
		are paid from the Federal	
		Treasury, they must be re-	
		garded as employed in "ad-	
		ministrative" positions "by the	
		United States" and hence sub-	
		ject to the prohibition in sec-	
		tion 2 of the Hatch Act	
		against the use of "official au-	
		thority for the purpose of in-	
		terfering with, or affecting,	
		the election or the nomination	
		of any candidate for the office	
		of President, Vice President,	
		Presidential elector, Member	
		of the Senate, Member of the	
		House of Representatives, or	
		Delegate or Resident Commis-	
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		insular possession" _____	407
		Alaska; Governor and Secretary of	
		Territory; Executive Branch.	
		2. The Governor and the	
		Secretary of the Territory of	
		Alaska, while employed in the	
		executive branch, are not to be	
		regarded as employed in the	

**Hatch Political Activity Act—
Continued.**

**Alaska; Governor and Secretary
of Territory; Executive Branch—
Continued.**

executive branch of the *Federal* Government, within the meaning of section 9(a) of the Hatch Act, forbidding officers and employees thereof to use "official authority or influence for the purpose of interfering with an election or affecting the result thereof," or to take "any active part in political management or in political campaigns," since (1) the context of the entire section reflects an intention to exclude policy-making positions, and (2) reference to subsequent enactments indicates a legislative recognition that Territorial officers therefore had been unaffected by the act -----

**Hawaii; Governor and Secretary of
Territory; Administrative Posi-
tions.**

3. Since the Governor and the Secretary of the Territory of Hawaii are appointed by the President, by and with the advice and consent of the Senate, and since their salaries are paid from the Federal Treasury, they must be regarded as employed in "administrative" positions "by the United States" and hence subject to the prohibition in section 2 of the Hatch Act against the use of "official authority for the purpose of interfering with, or affecting, the election or the nomination of any candidate for the office of President, Vice President, Presidential elector, Member of the Senate, Member of the House of Representatives, or Dele-

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**Hatch Political Activity Act—
Continued.**

**Hawaii; Governor and Secretary of
Territory; Administrative Posi-
tions—Continued.**

gate or Resident Commissioner from any Territory or insular possession" -----

**Hawaii; Governor and Secretary of
Territory; Executive Branch.**

4. The Governor and the Secretary of the Territory of Hawaii, while employed in the executive branch, are not to be regarded as employed in the executive branch of the *Federal* Government, within the meaning of section 9(a) of the Hatch Act, forbidding officers and employees thereof to use "official authority or influence for the purpose of interfering with an election or affecting the result thereof," or to take "any active part in political management or in political campaigns," since (1) the context of the entire section reflects an intention to exclude policy-making positions, and (2) reference to subsequent enactments indicates a legislative recognition that Territorial officers therefore had been unaffected by the act -----

**Hawaii; Office of Civilian Defense
Employees.**

5. Employees of the Office of Civilian Defense in the Territory of Hawaii, paid from funds allocated to the Secretary of the Interior from a special emergency appropriation made to the President, to provide for emergencies affecting the national security and defense (55 Stat. 92, 94), are employees of the executive branch of the Federal Govern-

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Hatch Political Activity Act—Continued.

Hawaii; Office of Civilian Defense Employees—Continued.

ment and accordingly are prohibited by section 9(a) of the Hatch Political Activity Act (act of August 2, 1939, 53 Stat. 1147, 18 U. S. C. 61h), as amended, from taking any active part in political management or in political campaigns. Consequently, they may neither seek nor hold elective office in the Government of the Territory of Hawaii__ 146

Hawaii; Director, Territorial Social Security Department.

6. The Director of the Territorial Social Security Department, by reason of his identity with the program of the Federal Social Security Act, and the definition of "State" to include "Territory" in section 19 of the Hatch Act, is subject to all of the prohibitions in sections 2 and 12(a) of the act against political activities on the part of officers and employees "of any State or local agency whose principal employment is in connection with any activity which is financed in whole or in part by loans or grants made by the United States or by any Federal agency"----- 391

Hawaii; Territorial Employees Generally.

7. No officers or employees of the Territory of Hawaii, other than the Governor, the Secretary, and the Director of the Territorial Social Security Department, are subject to any of the provisions of the Hatch Act unless shown to be employed in connection with a federally financed activity____ 391

Hawaii.

See Hatch Political Activity Act.

Hearings.

See Grazing and Grazing Lands, subheading Hearings on Appeal; Practice and Rules of Practice.

Helium.

See Indians and Indian Lands, subheading Navajo Tribe, Lease of Tribal Land for Helium Plant.

Highways.

See National Park Service, subheading County Roads.

Homestead.

See, also, Drainage, subheadings Arkansas, Minnesota; Forest Lieu Selection Statutes; Mineral Lands, subheading Agricultural Entry; Mining Claim; Public Lands; Reclamation, subheading "Resident Farm Owner," "Resident Entryman"; Soldiers' and Sailors' Civil Relief Act of 1940; Withdrawal of Public Lands.

Land Department Practice Re Satisfaction of Cultivation Requirement.

1. See Forest Lieu Selections.

Military Service; Applicant for Homestead Entry; Appeal.

2. Where an appeal is filed and perfected by an applicant for homestead entry prior to his entrance into the military service, action on the appeal in the regular course is not stayed by notice of military service ----- 138

Military Service; Applicant for Homestead Entry; Rehearing.

3. Where an applicant for homestead entry in the mili-

Homestead—Continued.**Military Service; Applicant for Homestead Entry; Rehearing—Continued.**

tary service is entitled by departmental regulations to a rehearing but, before filing and perfecting a motion for rehearing, he requests that final action on the entry be suspended during the period of his military service, action on the rehearing will be suspended during the period of military service, unless the applicant subsequently elects to proceed with the case during his service period -----

Qualifications of Entryman; Federal Employee.

4. Foreman of Civilian Conservation Corps, cooperating with Land Office on Alaskan Fire Control Project, made homestead entry and proper improvements prior to his death: *Held*, not to have been an employee of the Land Office so as to prohibit his interest in the purchase of public land within the meaning of Rev. Stat. sec. 452 (43 U. S. C. 11) -----

Stock Raising.**FINAL PROOF; EVIDENCE; ADVERSE PROCEEDINGS.**

5. Where an entryman submits final proof which is clearly insufficient on its face, there is no occasion for further proceedings. In some instances the entryman may be allowed an opportunity to make a further showing but adverse proceedings against the entry by the Government are not warranted -----

Suitability of Lands for Entry.

6. See Forest Lieu Selections.

Page Hunting and Fishing.

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See Indians and Indian Lands, subheadings Sisseton Reservation; Wind River Reservation.

Indemnity Lands.

See Railroad Land Grants.

Indian Reorganization Act.

See Indians and Indian Lands; Indian Tribes; Table of Statutes Cited, p. LX.

Indians.

See, also, Damage Claims, subheading Property Damage, Flooding; Indians and Indian Lands; Indian Tribes; Oil and Gas Leases, Indian Lands; Secretary of the Interior, Authority, subheading Delegation.

Legitimate and Illegitimate Children; Inheritance Rights; Descent and Distribution.

1. The act of February 28, 1891 (26 Stat. 794, 795, 25 U. S. C. 371), did not confer on illegitimate Indian children such a status of legitimacy as would permit them to share in estates of their mothers' kindred by representing their deceased mothers -----

2. Legitimate Indian children may represent their deceased father who was illegitimate, only if such father could have shared in the estates of his kindred -----

3. An illegitimate Indian child may represent his deceased father in estates of his father's kindred by reason of section 5 of the act of February 28, 1891 (26 Stat. 794, 795, 25 U. S. C. 371) -----

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Indians—Continued.

State Sales Taxes.

PURCHASES ON RESERVATIONS; RESTRICTED FUNDS; EXEMPTION.

4. Where the purchases are made on Indian reservations the Indians are exempt from payment of State sales taxes because Congress has given exclusive authority to the Commissioner of Indian Affairs to regulate trade with the Indians on Indian reservations and prices at which goods shall be sold to the Indians _____

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PURCHASES OFF RESERVATIONS; RESTRICTED FUNDS.

5. Where the purchases are made outside of Indian reservations the Indians are not exempt from the payment of State sales taxes unless the restricted funds used to make the purchases have been declared by Congress to be non-taxable _____

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Taxation.

See subheading State Sales Taxes; Oil and Gas Leases, Indian Lands, subheading State Taxes Imposed on Royalty, Liability of Indian Tribes.

Indians and Indian Lands.

See, also, Drainage, subheading Minnesota; Indians; Indian Tribes; Oil and Gas Leases, Indian Lands; Secretary of the Interior, Authority, subheading Delegation; United States, subheading Lands Acquired in Trust for Indians.

Alienation of Tribal Lands; Act of June 30, 1834.

1. While the act of June 30, 1834 (4 Stat. 729), prohibits

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Alienation of Tribal Lands; Act of June 30, 1834—Continued.

the sale or lease of lands by Indian tribes or nations, the prohibition does not extend to the sovereign _____

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Allotment.

See subheading Five Civilized Tribes, Rights-of-Way, Indian Reservations; subheading Osage Tribe, Restriction Against Alienation; subheading Rights-of-Way, Flathead Reservation; subheading Sisseton Reservation.

Allotted Lands, Use of.

LAND-USE CLASSIFICATION.

2. The Secretary is authorized to make a land-use classification of allotted lands, this being an administrative measure incidental to the carrying out of various statutory authorities _____

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POWER OF THE SECRETARY; ACT OF JUNE 18, 1934.

3. The Secretary is authorized to exercise all powers vested in him by statute with respect to leases, development loans, timber sales, and other land-management activities, in such a way as to accomplish conservation objectives _____

103

4. Statutes describing the jurisdiction of the Indian Office and of the Department of the Interior with respect to Indian affairs are not to be construed as grants of new substantive powers _____

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5. Section 6 of the act of June 18, 1934 (48 Stat. 984), is not a grant of new powers to the Secretary but is a direction to the Secretary to exercise, in the interest of con-

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Allotted Lands, Use of—Continued. ervation, powers theretofore vested in him_____	103	Ceded Lands; Disposition of Pro- ceeds, Taylor Grazing Act—Con. lands ceded to the United States for disposition under the public land laws." The Indians who ceded the lands are therefore entitled to only 50 percent of the proceeds_____	203
SOIL CONSERVATION AND DO- MESTIC ALLOTMENT ACT. 6. Allotted Indian lands are not "lands owned or con- trolled by the United States or any of its agencies" within the meaning of the Soil Conserva- tion and Domestic Allotment Act of April 27, 1935 (49 Stat. 163, 16 U. S. C. 590a <i>et seq.</i>)---	103	CONSISTENCY OF SECTION 11 OF TAYLOR GRAZING ACT WITH PROVISIONS OF ACTS OF CESSION. 9. There is no conflict be- tween section 11 of the Taylor Grazing Act and the provi- sions, as to disposition of pro- ceeds, contained in the acts of June 15, 1880 (21 Stat. 199), and February 20, 1895 (28 Stat. 677), by which the Ute Indians ceded their lands, and the acts of February 20, 1893 (27 Stat. 469), and June 10, 1896 (29 Stat. 321), by which the San Carlos Indians ceded their lands. While under these acts of cession the In- dians were to receive all of the proceeds, it may well be pre- sumed that the 50 percent of the proceeds which will not go to the Indians will be used by the Department of the Interior and the State to increase the value of the land itself. More- over, section 11 of the Taylor Grazing Act expressly pro- vides that ceded Indian lands shall continue to be subject to disposition under the "ap- plicable public land laws" de- spite inclusion in a grazing district. When incorporation of ceded Indian lands in graz- ing districts would be dis- advantageous to the Indians, the Secretary of the Interior may protect their interests by declining to take such action__	203
Blackfeet Tribe. See Oil and Gas Leases, Indian Lands, subheading Blackfeet Tribe, Oil Drilling Agreements; Oil and Gas Leases, Indian Lands, sub- heading State Taxes Imposed on Royalty, Liability of Indian Tribes.			
Ceded Lands; Disposition of Pro- ceeds, Taylor Grazing Act. INCLUSION WITHIN GRAZING DISTRICTS.			
7. Ceded Indian lands are "vacant, unappropriated and unreserved lands" within the meaning of section 1 of the Taylor Grazing Act of June 28, 1934 (48 Stat. 1269, 43 U. S. C. 315 <i>et seq.</i>), and such lands may therefore be included within grazing districts in the discretion of the Secretary of the Interior _____	203		
INCLUSION WITHIN GRAZING DISTRICTS; DISPOSITION OF PROCEEDS.			
8. When ceded Indian lands have been included within grazing districts, the proceeds must be disposed of in accord- ance with section 11 of the Taylor Grazing Act which is expressly applicable to "Indian			

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Ceded Lands; Disposition of Proceeds, Taylor Grazing Act—Con.

WITHDRAWAL UNDER INDIAN REORGANIZATION ACT; CONDITIONAL CONSENT TO INCLUSION WITHIN GRAZING DISTRICTS.

10. The normal application of section 11 of the Taylor Grazing Act to ceded Indian lands is not affected by the fact that they had been temporarily withdrawn from entry by the Secretary of the Interior pending consideration of their restoration to Indian ownership under section 3 of the Indian Reorganization Act of June 18, 1934 (48 Stat. 984, 25 U. S. C. 463), or by the fact that the consent to the inclusion of the lands so withdrawn was given under section 1 of the Taylor Grazing Act "with the understanding that this agreement will in no way jeopardize the right, title and interest of the Indians in and to these lands." Once this consent was duly given, the order of withdrawal had no further operative effect, and could not prevent the disposition of the proceeds according to the terms of the statute. The Secretary of the Interior could not in effect be given a power to include land within a grazing district and yet suspend the application of section 11 of the Taylor Grazing Act. Consent could not be conditionally given, particularly in view of the fact that the act itself was designed to protect the interests of the Indians by continuing the ap-

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pllicable public-land laws in operation with respect to such ceded Indian lands as were included within grazing districts -----

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PROCEEDS OF ISOLATED TRACTS.

11. The Indians are, however, entitled to all of the proceeds of ceded lands which have been leased as isolated tracts under section 15 of the Taylor Grazing Act, since the act contains no express provision for the disposition of the proceeds of such leased tracts. Section 10 of the Taylor Grazing Act, which is the general provision of the act governing the disposition of proceeds does not expressly mention ceded Indian lands either as originally enacted, or as amended by the act of June 26, 1936 (49 Stat. 1976, 1978). Although section 10 of the act refers generally to "moneys received under the authority of this Act," it may be assumed that Congress was referring only to such moneys which the United States was entitled to receive in its own right as proprietor and not to those received only by reason of a trust relationship. As between two competing interpretations of section 10, choice must be made in the light of the settled rule of construction that in the field of Indian legislation ambiguities are to be resolved in favor of the Indians -----

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POWER OF TRIBE; REGULATION OF USE AND OCCUPANCY IN CREATION OF VESTED RIGHTS; CONVEYANCE TO INDIVIDUAL MEMBERS.		See, also, Indian Tribes, subheading Five Civilized Tribes, Withdrawal of Restricted Funds; Oil and Gas Leases, Indian Lands, subheading Advance Royalty Payments, Lease Forms.	
12. The power, inherent in the tribe, to provide for the orderly distribution of the use and occupancy of tribal lands, does not, in view of the inhibitions of 25 U. S. C. 177, extend to the creation of vested enforceable interests in the individual members of the tribe -----	218	CONDEMNATION, RESTRICTED LANDS; CONGRESSIONAL AUTHORIZATION.	
13. Since such a vested enforceable interest would be created by a conveyance for a consideration by the tribe to an individual member of possessory title in tribal lands with the right to transmit that title by descent, devise, or conveyance <i>inter vivos</i> , such a conveyance may not be made in the absence of clear congressional authority therefor__	218	14. Authorization by Congress is a prerequisite to the valid condemnation of Indian lands restricted against alienation -----	85
Condemnation.		CONDEMNATION, RESTRICTED LANDS; UNITED STATES AN INDISPENSABLE PARTY.	
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Confederated Salish and Kootenai Tribes, Flathead Reservation.		CONDEMNATION, RESTRICTED LANDS; CONSENT TO CONDEMNATION; ACT OF MARCH 3, 1901.	
See Indian Tribes, subheading Per Capita Payments, Distribution.		16. If Congress has authorized the condemnation of Indian lands it has also consented to suits against the United States in such cases subject to any condition which Congress sees fit to impose__	85
Crow Indian Reservation, Montana.		17. The consent of the Secretary of the Interior is not essential to the maintenance of condemnation proceedings against lands of Indians of the Five Civilized Tribes under the act of March 3, 1901 (31 Stat. 1084) -----	85
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CONDEMNATION, RESTRICTED LANDS; JURISDICTION OF COURTS.		CONSTRUCTION CHARGES; RE-OPENING OF INVESTIGATION; ADMINISTRATIVE REDETERMINATION.	
18. In the absence of congressional direction to the contrary, the Federal and not the State courts have jurisdiction over proceedings in condemnation of restricted Indian lands	86	22. Public Resolution No. 40, approved August 5, 1939 (53 Stat. 1221), approved the order of the Secretary of the Interior of April 10, 1939, made under the act of June 22, 1936 (49 Stat. 1803), deferring the collection of irrigation construction charges pending the completion of an investigation of the San Carlos Irrigation Project. The Department, having determined on June 7, 1944, that the investigation had been completed, and having ordered the resumption of payment of construction charges, may not subsequently reopen the investigation, and thus in effect restore the moratorium. The applicable statutes cannot be interpreted to permit an administrative redetermination to be made.	745
RIGHTS-OF-WAY; INDIAN RESERVATIONS; ALLOTMENTS; OKLAHOMA WELFARE ACT.		Morongo Mission Indian Reservation, California.	
19. The lands of the Five Civilized Tribes prior to allotment constitute Indian reservations and as such are subject to the acts of February 15, 1901 (31 Stat. 790), and March 4, 1911 (36 Stat. 1253), authorizing the Secretary of the Interior to grant rights-of-way for telephone, telegraph and transmission lines, etc.	86	ELECTRIC TRANSMISSION LINE ACROSS ALLOTTED AND TRIBAL LANDS.	
20. Lands acquired for Indian tribes under authority of section 1 of the Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967), became in effect Indian reservations and as such subject to the provisions of the acts of March 3, 1901, February 15, 1901, and March 4, 1911	86	See Rights-of-Way, sub-heading Electric Transmission Lines	609
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OPERATION AND MAINTENANCE ASSESSMENTS; LIENS; INTEREST PENALTY.		TITLE TO TRIBAL LANDS; HELIUM LEASE.	
21. The departmental operation and maintenance assessments constitute a first lien in favor of the United States, and delinquencies in the payments of the assessments are properly subject to the interest penalty provided by 25 CFR 100.8	41	23. The fee simple title to the land is in the United States with the right of use and occupancy in the Navajo Tribe of Indians. The opinion of the Attorney General as to the validity of title pursuant	

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Navajo Tribe—Continued.		Osage Tribe—Continued.	
to Rev. Stat. 355, as amended, is unnecessary _____	351, 352	(a) the pro rata share of the balance remaining from the receipts of royalties and bonuses after deductions au- thorized by Congress have been made and (b) interest on trust funds to the individual credit of the owner in the Treasury of the United States	378
LEASE OF TRIBAL LAND TO GOVERNMENT FOR HELIUM PLANT.		HEADRIGHTS; SEGREGATION, TRIBAL FUNDS; INCOME; LIFE ESTATES.	
24. The United States may enter into a lease with the Navajo Tribe with the consent of the tribe and the approval of the Secretary _____	351	29. Until the Secretary of the Interior has segregated amounts from the Osage tribal funds with which to pay the pro rata share of the balance remaining from the receipts of royalties and bonuses after deductions authorized by Con- gress have been made, no part of these royalties and bonuses may be considered "income" to which the estate of a life tenant is entitled _____	378
25. While the act of June 30, 1834 (4 Stat. 729), pro- hibits the sale or lease of lands by Indian tribes or nations, the prohibition does not ex- tend to the sovereign _____	351	30. Where the segregation from the tribal fund is not made until after the death of the life tenant, her estate is not entitled to any part of the payments made after her death _____	378
HELIUM LEASE; BUREAU OF MINES; ERECTION OF IM- PROVEMENTS ON NAVAJO LANDS.		31. Where the segregation with which to make the pro rata share of the balance re- maining from the receipts of royalties and bonuses after deductions authorized by Con- gress have been made occurs prior to the death of an Osage owner of a headright, that amount shall be considered as having "accrued" within the meaning of section 4 of the act of March 2, 1929 (45 Stat. 1478). Where the segregation occurs after death the amount shall be considered as "accru- ing" _____	378
26. The Bureau of Mines is authorized to erect permanent improvements on leased lands pursuant to the act of Sep- tember 1, 1937 (50 Stat. 885) _____	351		
Oil and Gas Leases.			
See Oil and Gas Leases, In- dian Lands.			
Osage Tribe.			
See, also, Oil and Gas Leases, Indian Lands, subhead- ing Advance Royalty Pay- ments, Lease Forms.			
HEADRIGHTS; ROYALTIES AND BONUSES, OIL AND GAS.			
27. Royalties and bonuses received from the disposition of the oil and gas underlying the Osage lands belong to the Osage Tribe _____	378		
HEADRIGHTS; QUARTERLY PAYMENTS.			
28. The quarterly payments to owners of Osage headrights are composed of two items—			

Indians and Indian Lands—Con.	Page	Indians and Indian Lands—Con.	Page
Osage Tribe—Continued.		Osage Tribe—Continued.	
HEADRIGHTS; INTEREST ON TRUST FUNDS.		except with the approval of the Secretary of the Interior_____	464
32. Where an Osage owner of a headright has trust funds to his individual credit in the United States Treasury at the time of his death the interest due on such funds must be computed to the date of death. That part of the interest on trust funds to the individual credit of the owner in the Treasury of the United States representing interest on trust funds to date of death shall be considered as having "accrued" and the remainder as "accruing" within the meaning of section 4 of the act of March 2, 1929 (45 Stat. 1478) _____	378	36. An unallotted Osage Indian who has not received a certificate of competency may not, after March 2, 1929, alienate his interest without the approval of the Secretary of the Interior _____	465
RESTRICTION AGAINST ALIENATION; ALLOTTED LAND; REIMPOSITION OF RESTRICTION.		37. Any conveyance or incumbrance of the interest between 1921 and 1929 is as valid as a similar conveyance or incumbrance executed by any person not under any legal disability _____	465
33. An unallotted Osage Indian who inherited an undivided interest in an Osage allotment in 1921 took her interest free from restriction against alienation under section 6 of the act of April 18, 1912 (37 Stat. 86) _____	464	UNRESTRICTED FUNDS; RESTRICTIONS ON ALIENATION.	
34. Restrictions against alienation, applicable to members of the Osage Tribe, were extended to unallotted Osage Indians by the act of March 2, 1929 (45 Stat. 1478) _____	464	38. Lands purchased by members of the Osage Tribe with funds not under the supervision of the Secretary of the Interior and theretofore unrestricted are unrestricted in the hands of unallotted Osage devisees _____	117
35. Among those restrictions was that imposed by the act of February 27, 1925 (43 Stat. 1008), that lands devised to or inherited by members of the Osage Tribe of one-half or more Indian blood or who do not have certificates of competency shall be inalienable		Partition, Restricted Land.	
		AUTHORITY OF THE SECRETARY.	
		39. The Secretary of the Interior may not partition land held under a restricted deed by virtue of the authority vested in him by the act of May 18, 1916 (39 Stat. 127, 25 U. S. C. 378), which act authorizes him to partition inherited trust allotments_____	719
		EFFECT OF STATE COURT DECREE.	
		40. No partitioning of the Indian's restricted interest in land effected by a decree of a State court would be binding on the United States unless it were a party to the suit_____	719

Indians and Indian Lands—Con.	Page	Indians and Indian Lands—Con.	Page
Partition, Restricted Land—Con.		Pueblos—Continued.	
NON-INDIAN OWNER; LEGISLATIVE RELIEF.		COMPENSATION FUNDS; CONDITIONS OF LOANS.	
41. A non-Indian owner of an undivided interest in restricted Indian land cannot make the United States a party to any suit brought for the purpose of partitioning lands held under a restricted deed. Such a non-Indian owner's only remedy appears to be the enactment of legislation conferring upon some court jurisdiction to partition the land -----	719	45. The so-called compensation funds of the Picuris and Pojoaque Pueblos are available for any purpose considered of real benefit to the pueblo concerned, other than per capita payments, which are approved by the governing officials of the pueblos and the Commissioner of Indian Affairs. A loan of such funds to the Acoma and Laguna Pueblos to augment their present landholdings must be protected by adequate security and must return the lending pueblos the same or a greater rate of interest than the funds are now earning on deposit in the United States Treasury---	723
Pueblos.		Puyallup Tribe.	
TRIBAL CONTRACTS; STATUS AND POWERS OF INDIAN TRIBES.		See Indian Tribes, subheadings Individualized Tribal Funds, Per Capita Distribution; Estates of Deceased Enrollees.	
42. The pueblos of New Mexico possess the requisite capacity to enter into binding contracts, the validity of which depend upon the legality of the object and the means of attaining that object -----	723	Rights-of-Way.	
ACQUISITION OF LANDS, INDIAN REORGANIZATION ACT.		See, also, subheading Five Civilized Tribes, Rights-of-Way, Indian Reservations.	
43. Under sections 5 and 7 of the act of June 18, 1934 (48 Stat. 984), the Secretary of the Interior may acquire lands for the Acoma and Laguna Pueblos and declare them to be Indian reservation lands, and such action is not in violation of the act of May 25, 1918 (40 Stat. 561, 570)-----	723	TELEPHONE AND TELEGRAPH LINES; ALLOTTED LANDS; PIPE-LINE COMPANIES.	
44. The lands of the Acoma and Laguna Pueblos, whether now owned or hereafter acquired, are subject to the inhibitions on alienation or encumbrance found in section 4 of the 1934 act.-----	723	46. Rights-of-way across allotted Indian lands may be granted to pipe-line companies for the erection and maintenance of telephone and telegraph lines to be used in connection with their pipe-line business under the act of March 11, 1904 (33 Stat. 65), as amended by the act of March 2, 1917 (39 Stat. 973, 25 U. S. C. 321)-----	759

Indians and Indian Lands—Con.	Page	Indians and Indian Lands—Con.	Page
Rights-of-Way—Continued.		Rights-of-Way; Flathead Reservation—Continued.	
TRANSMISSION LINES ACROSS INDIAN ALLOTMENTS; AUTHORITY OF SECRETARY; GENERAL SUPERVISORY AUTHORITY.		the United States, has no application to the tribal lands on the Flathead Reservation ____	319
47. The Secretary of the Interior derives no authority from section 1 of the act of July 9, 1832, as amended (4 Stat. 564, 25 U. S. C. 2); section 17 of the act of June 30, 1834 (4 Stat. 735, 738, 25 U. S. C. 9); and section 12 of the act of February 14, 1903 (32 Stat. 825, 830, 5 U. S. C. 485), to grant revocable permits for the construction of transmission lines across Indian allotments. The "general supervisory authority" derived from these acts is simply a power to take administrative measures necessary for the execution of responsibilities and authorities otherwise more definitely fixed by statute or treaty _____	311	49. Legislation subsequent to 1890 by which Congress authorized the construction of ditches and canals across the tribal lands of the Flathead Reservation provides for the acquisition of the necessary rights-of-way and contains nothing to suggest that Congress intended the irrigation system on the Flathead Reservation to be constructed in disregard of Indian rights_____	319
Rights-of-Way; Flathead Reservation.		RESERVATION LANDS; PUBLIC LANDS.	
DITCHES AND CANALS; ACT OF AUGUST 30, 1890; RESERVATION IN PATENTS; SUBSEQUENT LEGISLATION.		50. The lands of Indian reservations established prior to August 30, 1890, were not subject to disposal under the land laws and were in no sense public lands _____	319
48. The provision in the act of August 30, 1890 (26 Stat. 391, 43 U. S. C. 945), requiring that in all patents for lands taken up after that date under any of the land laws of the United States west of the 100th meridian there shall be a reservation of a right-of-way for ditches or canals constructed by the authority of		TRIBAL LANDS; ACT OF AUGUST 30, 1890; TAKING OF LANDS; COMPENSATION.	
		51. The application of the act of August 30, 1890 (26 Stat. 391, 43 U. S. C. 945), to lands to which the tribal title had attached prior to its passage would constitute a taking of private property by the United States and would render the Government liable to a claim for just compensation under the Constitution__	319
		52. In any taking of the lands, either with the consent of the tribe or by condemnation, due consideration must be given, in the computation	

Indians and Indian Lands—Con.	Page	Indians and Indian Lands—Con.	Page
Rights-of-Way; Flathead Reservation—Continued.		Sisseton Reservation.	
of the amount due the Indians, to any compensating benefits which the tribal lands will receive by reason of the irrigation system constructed thereon -----	319	CRIMINAL JURISDICTION OF STATE; STATE GAME LAWS; ACTS OF FEBRUARY 8, 1887, MAY 8, 1906; ALLOTTED LANDS; UNALLOTTED INDIANS.	
ALLOTMENTS; ACT OF AUGUST 30, 1890; TRIBAL LANDS; REFORMATION OF PATENTS; COMPENSATION.		56. The jurisdiction of the courts of South Dakota to prosecute Indians for acts committed within the boundaries of the Sisseton Reservation depends upon whether Congress has consented that the Indians shall be subject to the criminal laws of the State -----	455
53. The act of August 30, 1890 (26 Stat. 391, 43 U. S. C. 945), applies to all allotments carved out of the public domain. It also applies to allotments made and patented from lands of Indian reservations created out of the public domain by statute or Executive order subsequent to 1890-----	320	57. Congress by the act of February 8, 1887 (24 Stat. 388), subjected all allottees to the criminal laws of the States in which they resided-----	456
54. Since lands which were in tribal status in 1890 were not subject to reserved public rights-of-way, it may not be assumed that they became subject to such rights-of-way by being allotted. Any language to the contrary included in a trust patent, being legally unauthorized, should be reformed or disregarded -----	320	58. By the amendatory act of May 8, 1906 (34 Stat. 182), Congress withheld such jurisdiction until the issuance of fee simple patents to Indians allotted thereafter -----	456
55. When rights-of-way are taken across Indian allotments, the allottee should receive the same compensation which would be due to the Indian tribe, in similar circumstances, if the land had never been allotted -----	320	59. Neither of these acts subjects unallotted Indians to the criminal laws of the States for acts committed within the reservations -----	456
Royalties.		60. Indians allotted prior to the effective date of the 1906 act may be prosecuted for violations of the State game laws within the reservation -----	456
See Oil and Gas Leases, Indian Lands.		61. Unallotted Indians and Indians allotted after 1906 may not be so prosecuted-----	456
		State Game Laws.	
		See subheadings Sisseton Reservation; Wind River Reservation.	

Indians and Indian Lands—Con.

Taxation.

See Indians, subheading State Sales Taxes, Purchases On and Off Reservations; Oil and Gas Leases, Indian Lands, subheading State Taxes Imposed On Royalty, Liability of Indian Tribes.

Wind River Reservation.

HUNTING AND FISHING, RESERVATION LAND; AUTHORITY OF TRIBAL COUNCILS.

62. The tribal councils may regulate hunting and fishing on the diminished portion of the reservation by Indians as well as non-Indians, and in particular they may regulate fishing on Bull and Ray Lakes on the diminished portion of the reservation _____

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HUNTING AND FISHING, CEDED LAND; STATE AUTHORITY; AUTHORITY OF TRIBAL COUNCILS.

63. The State may regulate hunting and fishing on the ceded portion of the reservation, including fishing in Ocean Lake, except that the tribal councils may regulate hunting and fishing on such areas thereof as may be restored to tribal ownership pursuant to the provisions of the Shoshone Judgment Act (53 Stat. 1128, 25 U. S. C. 571-577) _____

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HUNTING AND FISHING; CEDED LAND; STATE LICENSES.

64. The requirement of State licenses to hunt or fish on the ceded portion of the reservation may not be made a means of raising revenue__

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Indians and Indian Lands—Con. Page

Wind River Reservation—Con.

HUNTING AND FISHING; APPLICABILITY OF 25 U. S. C. 216.

65. Section 216, 25 U. S. C., is applicable to the restored lands but it may be invoked only against non-Indians who hunt upon the lands without a license _____

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Indian Tribes.

See, also, Indians; Indians and Indian Lands; Oil and Gas Leases, Indian Lands.

Alienation of Tribal Lands.

1. While the act of June 30, 1834 (4 Stat. 729), prohibits the sale or lease of lands by Indian tribes or nations, the prohibition does not extend to the sovereign _____

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Determination of Membership; Indian Reorganization Act.

2. By the act of June 18, 1934 (48 Stat. 984), Congress affirmatively recognized the rights of Indian tribes who accepted its provisions to determine their membership for all tribal activities_____

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Tribal Constitutions, Interpretation; Subsequent Legislation.

3. A tribal constitution does not freeze acts of Congress in existence at the time of its adoption, and powers constitutionally vested in a tribal council are not limited by any such act after it has been repealed or superseded _____

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Tribal Oil Leases; Necessity of Departmental Approval; Effect of Approval as to Form.

4. See Oil and Gas Leases, Indian Lands, subheading Blackfeet Tribe.

Indian Tribes—Continued.

Confederated Salish and Kootenai
Tribes, Flathead Reservation.

PER CAPITA PAYMENTS, DIS-
TRIBUTION; TRIBAL ROLLS;
INDIAN REORGANIZATION
ACT.

5. The tribal council of the
Confederated Salish and
Kootenai Tribes of the Flat-
head Reservation may not in-
sist upon distribution of a per
capita payment, arising from
funds accruing to the tribe
subsequent to its organization
under the act of June 18,
1934 (48 Stat. 984), upon the
basis of the 1920 roll_____

TRIBAL ROLLS; SEGREGATED
AND INDIVIDUALIZED
FUNDS; REPEAL OF AU-
THORITY FOR SEGREGATION.

6. The 1920 roll was pre-
pared pursuant to the pro-
visions of section 28 of the
act of May 25, 1918 (40 Stat.
591, 25 U. S. C. A. 162), and the
act of June 30, 1919 (41 Stat.
9, 25 U. S. C. A. 163). Rolls
made pursuant to the 1919 act
are required to be used only
for the completion of the dis-
tribution of such funds as
have been segregated under
the 1918 act and remain undis-
tributed. Those acts grant no
personal interest to any in-
dividual Indian in the com-
mon or communal funds of
any tribe _____

7. The roll of 1920 must be
regarded as controlling only
for the purpose of making
payment to enrollees whose
names appear on that roll, or
to their heirs or legatees, of
the shares of any tribal funds
which have been segregated
and individualized pursuant
to the act of 1918_____

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Indian Tribes—Continued.

Confederated Salish and Kootenai
Tribes, Flathead Reservation—
Continued.

8. The utility of the roll of
1920 for the purpose of such
a segregation was destroyed
by the repeal, by section 2 of
the act of June 24, 1938 (52
Stat. 1037), of the authority
for such a segregation_____

DETERMINATION OF MEMBER-
SHIP; INDIAN REORGANI-
ZATION ACT.

9. By the act of June 18,
1934 (48 Stat. 984), Congress
affirmatively recognized the
rights of Indian tribes who
accepted its provisions to de-
termine their membership for
all tribal activities _____

10. The Flathead Tribe
voted to accept the provisions
of the 1934 act and has
organized and adopted a con-
stitution thereunder. That
constitution prescribes defi-
nite rules of membership and
is thus determinative of those
who are entitled to share in
the distribution of tribal prop-
erty _____

PER CAPITA PAYMENTS;
VETO POWER OF TRIBAL
COUNCIL.

11. Under the provisions of
the act of June 18, 1934 (48
Stat. 984), and the provisions
of the tribal constitution, the
tribal council has the privi-
lege of approving or vetoing
the per capita payment au-
thorized by the Secretary of
the Interior _____

12. If the council approves
the per capita payment, dis-
tribution thereof must be
based on a constitution roll
to be adopted by the council__

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Indian Tribes—Continued.

Confederated Salish and Kootenai Tribes, Flathead Reservation—Continued.

REFERENDUM; FUNDS IN U. S. TREASURY.

13. Article VI, section 1(h), of the tribal constitution requires approval by a popular referendum of appropriations by the tribal council of "available applicable tribal funds" in excess of \$5,000. Since the funds in question are funds in the Treasury of the United States, they are not available for appropriation by the tribal council and, therefore, section 1(h) of Article VI is without application _____

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Five Civilized Tribes.

WITHDRAWAL OF RESTRICTED FUNDS; CLAIMS AGAINST RESTRICTED FUNDS; AUTHORITY OF SUPERINTENDENT; AUTHORITY OF SECRETARY.

14. Section 18 of the act of February 14, 1920 (41 Stat. 408, 426), which vests in the Superintendent for the Five Civilized Tribes of Oklahoma certain responsibilities respecting the disposition of restricted Indian moneys, is not superseded by section 1 of the act of January 27, 1933 (47 Stat. 777), which relates to the responsibilities of the Secretary of the Interior with respect to such moneys. The earlier statute, while still in force, must be limited in application to the payment of "undisputed claims," and it has no bearing upon the removal of restrictions at the request of the Indians concerned _____

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Indian Tribes—Continued.

Page

Puyallup Tribe.

INDIVIDUALIZED TRIBAL FUNDS; PER CAPITA DISTRIBUTION.

15. The Puyallup tribal fund resulting from the sale of the Tacoma Hospital site was individualized by the act of December 5, 1942 (56 Stat. 1040), which directed that per capita distribution be made to those members of the tribe, or their heirs, whose names appeared on a previously prepared membership roll. In view of the tribal character of the fund no member enjoyed vested rights therein until individualization occurred, and only those persons who meet the requirements of the 1942 act would be entitled to participate in the per capita distribution_____

680

PER CAPITA PAYMENTS; ESTATES OF DECEASED ENROLLEES; DESCENT AND DISTRIBUTION.

16. Since no enrollee who died prior to enactment of the act of December 5, 1942 (56 Stat. 1040), had a vested right in the tribal property which was subject to testamentary disposition at the time of his death, the per capita share credited to the estate of a deceased enrollee may not be paid to the legatees named in his will but must be distributed to his heirs at law as if he had died intestate_____

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Taxation.

See Oil and Gas Leases, Indian Lands, subheading State Taxes Imposed on Royalty, Liability of Indian Tribes,

Indian Tribes—Continued.**Ute Mountain and Blackfeet Tribes.**

See Oil and Gas Leases,
Indian Lands, subheading
State Taxes Imposed On Roy-
alty, Liability of Indian
Tribes.

Innocent Purchasers.

See Railroad Land Grants.

Interpretation of Statutes.

See Statutory Construction.

Inventions.**Federal Employees.**

**EMPLOYMENT TO INVENT;
GOVERNMENT RIGHT TO IN-
VENTION.**

1. An employee of the Geo-
logical Survey required to
pursue and direct research in
the development of new
methods and devices in a par-
ticular field is employed to
make an invention within the
terms of *United States v.
Dubilier Condenser Corpora-
tion*, 289 U. S. 178 (1933),
and so is any employee as-
signed to work with him in
connection with his experi-
mentation. An invention made
as a result of an assignment
to invent belongs to the Gov-
ernment, and the inventor
may not retain commercial
rights thereto -----

**FUNCTIONS OF RADIO SEC-
TION; GOVERNMENT RIGHT
NOT RELATED TO EM-
PLOYEES' ASSIGNMENT;
ORDER No. 1763.**

2. The invention of "a sys-
tem of sound recording and
reproduction and/or a dy-
namic range control for radio
broadcasting" by employees
of the Department's Radio-
Television Section did not
arise in the course of, and was

Page Inventions—Continued.**Federal Employees—Continued.**

not related to the general field
of assigned research or in-
vestigation, because the De-
partment's radio studio is
operational rather than ex-
perimental, and any research
required of the employees was
confined to planning, design-
ing or altering its equipment
and studying questions con-
nected with particular pro-
grams -----

3. An invention made by
employees of the Interior De-
partment which is not related
to research or investigation
within the general field of
their assignments, on their
own time, without Govern-
ment facilities or financing,
and without the aid of in-
formation not available to the
public, is not covered by De-
partmental Order No. 1763 of
November 17, 1942, requiring
all inventions made by em-
ployees within the general
scope of their governmental
duties to be assigned to the
Government -----

**MAKING OR DEVELOPMENT;
ASSIGNMENT TO GOVERN-
MENT UNDER ORDER No.
1763.**

4. The drafting of working
drawings and the reduction
to practice on Government
time, with Government facili-
ties and financing, of an in-
vention completely conceived
on the inventor's own time,
are such substantial steps in
the making or development
of the invention as to require
the assignment of the inven-
tion to the Government un-
der Departmental Order No.
1763 -----

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Inventions—Continued.

Federal Employees—Continued.

MINING ENTERPRISE; CON-
FLICT OF PRIVATE INTER-
EST AND PUBLIC DUTY.

5. An officer of the United States may not engage in any private business activity which conflicts with the particular public office he holds. Sharing in the proceeds of a mercury or other mining lease is a private interest which conflicts with a public office the duties of which include the collection of economic and statistical information on the production, movement, treatment and marketing of ores and metals. The obtaining for the use of a mineral prospecting invention of compensation not dependent on production of a mine or interest in a mine does not conflict with such a public office__ 354

MINING ENTERPRISE; PRO-
HIBITION OF PRIVATE IN-
TERESTS; ORGANIC ACT,
BUREAU OF MINES.

6. Irrespective of any conflict of interest, a member of the Bureau of Mines is prohibited by section 4 of the act of February 25, 1913 (37 Stat. 681), from having any interest in a mine or in the proceeds of a mine concerning which the Bureau of Mines is conducting any investigation or economic or other inquiry 355

MINING ENTERPRISE; RE-
STRICTION OF PRIVATE IN-
TERESTS; REGULATORY
POWER OF DEPARTMENT.

7. The private business interests of officers and employees of the Bureau of Mines may be restricted by

Page

Inventions—Continued.

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Federal Employees—Continued.

regulations issued by the Secretary of the Interior_____ 355

MINING ENTERPRISE; TIME
OF INVENTION; OUTSIDE
SCOPE OF GOVERNMENTAL
DUTIES; ASSIGNMENT TO
UNITED STATES NOT RE-
QUIRED BY ORDER No.
1763.

8. An official of the Bureau of Mines, whose invention was made prior to November 17, 1942, and outside the general scope of his governmental duties, is not required by Secretary's Order 1763 of November 17, 1942, to assign his invention to the United States and may own and control his invention, irrespective of whether its use may be in a mine which is the subject of investigation or inquiry by the Bureau of Mines_____ 355

PATENTS; AUTHORITY OF THE
SECRETARY TO REQUIRE
ASSIGNMENT TO UNITED
STATES; DEPARTMENTAL
ORDER.

9. Authority for promul-
gation of a departmental
order requiring that each em-
ployee of the Department,
as a condition of his em-
ployment, assign to the
United States all rights to
any inventions made by him
in the course of his govern-
mental activities is contained
in section 161 of the Revised
Statutes (5 U. S. C. 22), if
such an order is "not incon-
sistent with law." There is
no statutory provision or
court decision declaring such
an order invalid_____ 165

Inventions—Continued.

Federal Employees—Continued.

PUBLIC INTEREST.

10. A showing that an invention may be used by the Government is a sufficient showing of public interest for a certificate to that effect to be signed enabling the inventors to file their patent application without the payment of fees under the act of March 3, 1883, as amended (35 U. S. C. 45) -----

"RESEARCH OR INVESTIGATION"; INTERPRETATION WITHIN THE MEANING OF ORDER No. 1763; DUTIES OF EMPLOYEE.

11. An employee is engaged in "research or investigation," as used in Departmental Order No. 1763 of November 17, 1942, if his duties include the study of principles of a subject with a view to increasing the field of knowledge or of discovering practical applications of the principles; or if he is assigned to the solution of a practical problem where known solutions are unsatisfactory in such circumstances that good craftsmanship or professional competence would require him to engage in research or investigation in an attempt to reach an adequate solution. An engineer assigned to procure a particular type of valve, where none is in existence and substitutes are unsatisfactory, is assigned to engage in "research or investigation" within the meaning of Order No. 1763 -----

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Inventions—Continued.

Federal Employees—Continued.

RESEARCH OR INVESTIGATION; SPECIFIC ASSIGNMENT; ASSIGNABLE TO GOVERNMENT UNDER ORDER No. 1763.

12. An invention made pursuant to a specific assignment calling for research or investigation, in the course of research or investigation and relevant to the general field of the assigned inquiry, is assignable to the Government under Departmental Order No. 1763 -----

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ROYALTY PAYMENTS; USE OF PATENTED DEVICES; CONTRACT SPECIFICATIONS; PROTECTION TO CONTRACTORS.

13. Bureaus of the Interior Department are not authorized to pay royalties for the use of patented devices to employees of the United States Government or their assignees, or to former employees of the Government who invented or discovered the devices while they were employed by the Government. -----

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14. Specifications on Interior Department contracts may properly include provisions stating that the United States has the right to use inventions patented by employees of the United States and that no royalties are to be chargeable to the United States for the use of such inventions -----

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15. Contractors authorized by the Bureaus of the Interior Department to use inventions patented by employees of the United States are protected from liability to the patentees -----

Inventions—Continued.

Federal Employees—Continued.

for infringement and for payment of royalties by the act of June 25, 1910 (36 Stat. 851), as amended by the act of July 1, 1918 (40 Stat. 705, 35 U. S. C. 68) -----

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SCOPE OF GOVERNMENTAL DUTIES; ASSIGNMENT TO UNITED STATES UNDER ORDER No. 1763.

16. An invention conceived during the consideration of problems connected with an employee's work, when his duties included research and investigation, is required to be assigned to the United States under Order No. 1763, November 17, 1942-----

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17. The invention of a safety valve by an employee of the Bureau of Mines whose duties include the designing of equipment in that field, and who was given the task of procuring such a valve because of his special qualifications, is within the general scope of the governmental duties of the employee, and as such is required to be assigned to the Government under Departmental Order No. 1763. It is immaterial that the invention was conceived on the employee's own time--

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TIME OF INVENTION; DEVELOPMENT OF INVENTION; ASSIGNMENT TO GOVERNMENT UNDER ORDER No. 1763.

18. An invention substantially developed on Government time, with Government facilities and financing after

Page Inventions—Continued.

Federal Employees—Continued.

November 17, 1942, the effective date of Departmental Order No. 1763, is required to be assigned to the Government even though it was conceived before that date outside the general scope of the inventors' governmental duties -----

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TIME OF INVENTION; PROOF OF INVENTION; ORDER No. 1763.

19. An invention not represented by a working drawing or model, and not disclosed by demonstrable overt action prior to the issuance of Order No. 1763 on November 17, 1942, is subject thereto -----

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Investigations.

See Congressional Investigation, subheading Scope of Physician's Privilege; Indians and Indian Lands, subheading San Carlos Irrigation Project, Reopening of Investigation.

Irrigation.

See Indians and Indian Lands, subheading Irrigation Project; Reclamation, subheading Sale of Unproductive Lands; Rights-of-Way, subheading Ditches and Canals; Soil and Moisture Conservation Activities.

Isolated Tracts.

See, also, Indians and Indian Lands, subheading Ceded Lands, Proceeds of Isolated Tracts, Taylor Grazing Act.

Isolated Tracts—Continued.

Page

Restoration to the Public Domain.

1. An isolated tract may not be released from a withdrawal for a use contrary to the public interest.-----229, 235

Laches.

See Forest Lieu Selection Statutes, subheading Treatment of Right as Scrip.

Leases.

See Contracts, subheading Departmental Approval as to Form; Indians and Indian Lands, subheading Navajo Tribe; Oil and Gas Lands; Oil and Gas Leases, Indian Lands; Mineral Leasing Act; United States, subheading Grant By.

Legislation.

See, also, Forest Lieu Selections, subheading Legislation re Selections in Lieu of Lands in Forest Reserves; Forest Lieu Selection Statutes, subheading Relief Legislation; Statutory Construction.

Proviso in Appropriation Act Limiting Use of Funds During Service of Designated Executive Officer, Puerto Rico; Constitutional Limitations on Legislative Power.

1. The proviso in H. R. 7505, 77th Cong., 2d sess., that no funds appropriated pursuant to the act shall become available at any time "during the service of the present Governor" of Puerto Rico is unconstitutional because (1) it constitutes an encroachment upon executive power, (2) it is a bill of attainder, and (3) it violates due process.-----

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Licenses.

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See Grazing and Grazing Lands; Indians and Indian Lands, subheading Wind River Reservation, Hunting and Fishing.

Liens.

See, also, Indians and Indian Lands, subheading Flat-head Irrigation Project, Assessments.

System for Satisfaction of State Drainage Liens on United States Lands.

1. See Drainage, subheadings Arkansas, Minnesota.

Lieu Selections.

See Forest Lieu Selections.

Liquidated Damages.

See Contracts.

Loans.

See Indians and Indian Lands, subheading Pueblos, Compensation Funds, Conditions of Loans; Secretary of the Interior, Authority, subheading Delegation, Advance Authorizations for Sale of Restricted Lands Pledged as Security for Loans.

Manila Railroad Company.

See Philippine Government.

Measure of Damages in Trespass on Government Lands Considered a Federal Question by Department of Justice.

See Trespass, subheading Measure of Damages and Erie Doctrine.

Michigan, State of.

See United States, subheading Grant By.

Military Service.

See Soldiers' and Sailors' Civil Relief Act of 1940.

Mill Sites.

See Mining Claim.

Mineral Exploration Agreements.

See Bureau of Mines.

Mineral Lands.

See, also, Mineral Leasing Act, subheading Lands Valuable for Sodium; Mining Claim; Rights-of-Way, subheading Railroad; Taylor Grazing Act and Lands, subheading State Exchanges.

Agricultural Entry.

1. *Prima facie* allowable when no return of the lands as mineral by surveyor general _____ 475

Classification.

2. Lands having a mineral classification made by a board of commissioners under authority of the act of February 26, 1895 (28 Stat. 683), approved by the Secretary of the Interior and never revoked are *prima facie* mineral lands _____ 272, 278, 279

Nonmetalliferous; Pumice.

3. See Withdrawal of Public Lands, subheading Reclamation.

Proof of Mineral Character.

4. When required of mineral claimant _____ 475

Mineral Leasing Act.

See, also, Mineral Lands; Mining Claim; National Parks and Monuments, subheading Death Valley National Monument; Oil and Gas Lands.

Mineral Leasing Act—Con.

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Lands Valuable for Sodium; Evidence.

1. In determining whether land was of known mineral (sodium) character, as contemplated by the Mineral Leasing Act, and, therefore, excepted from location and disposition under the mining laws, all that is required is that such competent evidence show that the lands were known to be valuable for sodium when the attempted location under the mining laws was made, that is, that the known conditions at that time were such as reasonably to engender the belief that the lands contained sodium borates in such quantity and of such quality as would render their extraction profitable and justify expenditures to that end _____ 426

Lands Valuable for Sodium Borates; Mining Laws.

2. Adverse proceedings directed by the Government against the mineral entry of the United States Borax Company: *Held*, (1) that the SW $\frac{1}{4}$, SW $\frac{1}{4}$, NE $\frac{1}{4}$ Sec. 24, T. 11 N., R. 8 W., S. B. M., embracing the Little Placer claim, contains valuable deposits of sodium borates; (2) that the said sodium borate materials, to wit, tincal and kernite, are soluble in water and were dissolved in water, and accumulated by concentration; (3) that at the time the appellant perfected its mining location on the lands embracing the Little Placer mining claim the lands were known to contain valuable deposits of sodium borates; (4) that the lands embracing the

Mineral Leasing Act—Con.

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Lands Valuable for Sodium Borates;
Mining Laws—Continued.

Little Placer mining claim or the sodium borates therein contained are not subject to disposition under the general mining laws but only under the act of February 25, 1920 (41 Stat. 437, 30 U. S. C. 181), known as the Mineral Leasing Act _____

Contest Charges Against Conflicting
Placer Claim; Findings and Conclusions.

3. A charge to the effect that a sodium borate deposit prevented a location being made under the mining laws, necessarily meant that the deposit was of the type contemplated by the Mineral Leasing Act. Findings and conclusions based on contest charges are to be read together in a reasonable manner _____

Lands Patented Without Oil and
Gas Reservation.

4. Where land is granted by United States without reservation of oil and gas, applications for lease on such land under the Mineral Leasing Act (act of February 25, 1920, 41 Stat. 437, 30 U. S. C. 181, *et seq.*, as amended) are properly denied _____

Public Lands Acquired for Specific
Purpose; President's Authority
to Protect from Oil and Gas
Drainage; Secretary's Authority
to Enter into Compensatory Oil
and Gas Agreement.

5. Lands acquired by War Department for specific public purpose, as distinguished from the public domain, are not subject to lease under the Mineral Leasing Act, and the Department of the Interior has no jurisdiction over and cannot

Mineral Leasing Act—Con.

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Public Lands Acquired for Specific
Purpose; President's Authority
to Protect from Oil and Gas
Drainage; Secretary's Authority
to Enter into Compensatory Oil
and Gas Agreement—Continued.

issue oil and gas leases to such lands even though the lands so acquired were at one time part of the public domain _____

6. The President has implied authority to take protective measures in cases where lands acquired for a specific public purpose are found to contain oil and gas which is being drained by adjoining owners, which authority is vested in the department or agency having jurisdiction over the land, but may be transferred to another department by Executive order _____

7. Where an Executive Order (No. 9087) transferred from the War Department to the Secretary of the Interior the President's implied authority to protect from drainage lands acquired by the War Department for use in straightening and widening the Sacramento River, these lands are not subject to the terms of the Mineral Leasing Act. The Secretary may, however, lease them or enter into compensatory agreements with oil companies operating contiguous to them _____

8. In the absence of proof that oil company contracting with United States under compensatory agreement was drilling on or into Federal lands, it could not be held liable for drainage of gas prior to the effective date of the agreement _____

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Mineral Leasing Act—Con.

Public Lands Acquired for Specific Purpose; President's Authority to Protect from Oil and Gas Drainage; Secretary's Authority to Enter into Compensatory Oil and Gas Agreement—Continued.

9. The Department had no authority to classify the land until after Executive Order No. 9087 was promulgated pursuant to which the Geological Survey determined the producing limits of the field__

523

Sodium; Leases and Prospecting Permits.

10. The issuance of leases and prospecting permits for sodium is discretionary with the Secretary of the Interior__

21

Mining Claim.

See, also, Mineral Lands; Mineral Leasing Act; Oil and Gas Lands; Withdrawal of Public Lands.

Abandonment.

1. Abandonment of claim effected by claimant's proper homestead application _____

474

Conflict with Prospecting Permit; Segregative Effect; Grounds for Contest.

2. Mining claims cannot be located on land covered by an oil and gas prospecting permit, which until canceled of record, segregates the land from location under the mining laws _____

427

3. Where official records of the General Land Office show mining claim void from its inception because of conflict with outstanding prospecting permit, no contest on that ground is required _____

427

Discovery of Mineral; Proof.

4. A discovery of mineral which will validate a location

Mining Claim—Continued.

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Discovery of Mineral; Proof—Con.

under the mining laws must show that the land is more valuable for the removal and marketing of the mineral than for any other purpose; that the removal and marketing will yield a profit or that the mineral exists in such quantity as to justify a prudent man in expending labor and capital to obtain it _____

671

Discovery of Mineral in National Forest; Quality of Proof.

5. When mining claims are located on lands within a national forest and embrace desirable recreational areas the showing of mineral values must be clear and unequivocal _____

671

Extinguishment; Procedure.

6. How extinguished when claim not *adjudicated* to be void. Procedure by locators, including homestead applicant _____

475

Homestead Application.

7. When allowable despite prior mining location _____

475

Invalid Locations.

8. The Department's duty to administer the public domain precludes sanction of monopolies of large areas through locations held without compliance with the law _____

567

Land Classified as Coal.

LOCATION; NONMETALLIC MINERALS.

9. The mere classification of land as coal land does not bar a location of the land under the mining law for non-metallic minerals unless in fact the land possesses value for coal _____

753

Mining Claim—Continued.

Land Classified as Coal—Con.

DECLARATION OF NULLITY.

10. It is error to adjudge a mining claim located on land classified as coal void because of such classification without giving the claimant thereof an opportunity to dispute the classification -----

754

PROTEST; BURDEN OF PROOF.

11. A mining claimant of an asserted oil placer claim who protests against the issuance of an oil and gas lease on land classified and priced as coal land and within the boundaries of petroleum reserve, to sustain his allegations of a superior right will be required to show that the land possesses no value for coal and at the date of the petroleum withdrawal that the claimants of the conflicting mining claim, in the absence of discovery of mineral on that date, were in diligent prosecution of work leading to the discovery of oil or gas, which work was continued with diligence to discovery -----

754

Mill Sites, Classes.

12. Under section 2337, Rev. Stat., 30 U. S. C. 42, two classes of mill sites may be located; those used in connection with mining operations on a vein or lode and those not connected with a vein or lode upon which quartz mills or reduction works are located -----

671

Placer Claims; Absence of Diligent Prosecution of Work Leading to Discovery.

13. Placer claims abandoned by original locators but claimed by appellant under

Mining Claim—Continued.

Page

Placer Claims; Absence of Diligent Prosecution of Work Leading to Discovery—Continued.

purported assignment held void in absence of diligent prosecution of work leading to discovery of valuable minerals (act of June 25, 1910, 36 Stat. 847; Mineral Leasing Act of February 25, 1920) -----

567

Void Claims; Jurisdiction of Department.

14. The Department has power to declare mining claims void prior to the filing of an application for patent ---

567

Minnesota Conservation Statutes.

See Drainage, subheading Minnesota.

Natchez Trace Parkway.

See National Park Service.

National Cemeteries.**Porters' Lodges and Superintendents.**

1. Whether the Director of the National Park Service is required by Revised Statutes secs. 4873-4875 to maintain a porter's lodge and to employ a superintendent at each of the national cemeteries under his jurisdiction: *Held*, the Director of the National Park Service is not required to maintain a porter's lodge and to employ a superintendent, when in his judgment the continuance of the office of cemetery superintendent and the maintenance of a porter's lodge at certain cemeteries is no longer justified -----

17

National Parks and Monuments.

See, also, National Park Service; President's Authority, subheading Olympic Na-

National Parks and Monuments—Continued.

tional Park; Rights-of-Way, subheading Aerial Tramway, Grand Canyon National Park.

Death Valley National Monument; Mineral Leasing Act of 1920.

1. The act of June 13, 1933 (48 Stat. 139, 16 U. S. C. 447), which extended to lands in the Death Valley National Monument the laws known as the "mining laws of the United States," did not extend thereto the provisions of the Mineral Leasing Act of 1920. The issuance of leases and prospecting permits for sodium is discretionary with the Secretary of the Interior_____

21

Domestic Animals Trespassing; Impounding and Sale.

2. The Congress may provide for the impounding and sale of domestic animals trespassing on Federal lands in the exercise of its "police power" pursuant to Article IV, section 3, of the United States Constitution. In authorizing the Secretary of the Interior to "protect" and "preserve" and regulate the "use" of parks and monuments in the act of August 25, 1916 (39 Stat. 535, 16 U. S. C. 1-3), Congress has impliedly empowered the Secretary to prescribe regulations designed to provide for the impounding and sale of domestic animals trespassing on park and monument areas_____

47

National Park Service.

See, also, National Cemeteries, subheading Porters' Lodges and Superintendents; National Parks and Monuments; Rights-of-Way, subheading Ditches and Canals.

National Park Service—Con. Page

County Roads.

STATE AND FEDERAL JURISDICTION, ROCKY MOUNTAIN NATIONAL PARK; SALE AND CONVEYANCE.

1. The National Park Service has no police jurisdiction over county roads until title thereto is acquired by the Government and jurisdiction is ceded or consented to by the State. A sale and conveyance comprehends a transfer for valuable considerations such as benefits and advantages that will accrue to the inhabitants of the county_____ 81

REGULATION AND MAINTENANCE.

2. The United States is not authorized to regulate and maintain highways not owned by the Government _____ 81

Natchez Trace Parkway.

PROTECTION AND REGULATION OF USE OF FEDERAL PROPERTY; FEDERAL CRIMINAL LAWS AND NATIONAL PARK REGULATIONS APPLICABLE TO PARKWAY.

3. Pursuant to Article IV, Sec. 3, Cl. 2, of the Federal Constitution, the Congress may legislate for the protection and regulation of use of all Federal lands _____ 467

4. With respect to parks and parkways, Congress has also authorized the Secretary of the Interior to issue regulations designed to effectuate this power _____ 467

5. The Federal criminal laws and National Park Service regulations relating to the protection and regulation of use of Federal property are applicable to the Natchez

National Park Service—Con.

Natchez Trace Parkway—Continued.

Trace Parkway lands, the title to which is vested in the United States _____

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Navajo Tribe.

See Indians and Indian Lands.

Navigable Waters.

See Public Lands, subheading Accretion and Avulsion.

Negligence.

See Damage Claims, subheading Property Damage.

Oaths.

Field Examiners Authorized to Administer by Act of October 14, 1940.

1. Field examiners of the Branch of Field Examination in the General Land Office are authorized by the act of October 14, 1940 (54 Stat. 1175, 5 U. S. C. 498), to administer oaths in the performance of their official duties. Departmental Order No. 1639 of January 17, 1942, reallocating functions of the Division of Investigations to the Branch of Field Examination in the General Land Office carried with it the authority to administer oaths under the act of October 14, 1940 _____

493

Field Examiners; Authority to Execute Jurats Not Conferred by Act of October 14, 1940.

2. The act of October 14, 1940, grants authority to administer oaths "whenever necessary in the performance of * * * official duties." Since these duties are investigatory in nature, the authority to

Oaths—Continued.

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Field Examiners; Authority to Execute Jurats Not Conferred by Act of October 14, 1940—Con.

administer oaths is incidental to the investigatory function and therefore the act of October 14, 1940, confers no authority to execute jurats attached to applications for public lands _____

494

Officers Qualified to Administer in Public Land Cases in United States and Alaska.

3. Jurisdictional restriction imposed by Rev. Stat. sec. 2294 of limited applicability—Improperly extended by regulation of September 3, 1926, in 43 CFR 210.1—Execution of oaths in cases under other statutes controlled by the terms thereof or by the Secretary's regulations thereunder if statutes are silent ____ 540-541

Oil and Gas Lands.

See, also, Coal Lands; Mineral Leasing Act; Mining Claim; Oil and Gas Leases, Indian Lands; Res Judicata; United States, Grant By.

Assignments of Leases.

APPROVAL BY THE SECRETARY;
REGULATION; LEGAL RELATIONSHIP.

1. Since assignments of oil and gas leases may be made only with the approval of the Secretary of the Interior, the Secretary may by regulation establish the legal relationship resulting from the approved assignment, for the power to grant or withhold consent or approval includes the power to impose reasonable conditions in giving consent _____

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Oil and Gas Lands—Continued.	Page	Oil and Gas Lands—Continued.	Page
Assignments of Leases—Continued.		Cancellation of Leases; Act of February 25, 1920, as Amended August 21, 1935—Continued.	
2. The Secretary of the Interior has by regulation established the legal relationship between the United States and the lessees and assignees of portions of oil and gas leases upon approval by the Secretary. Such assigned portions of leases are to be considered segregated as new leases and such assignees are to stand in the same position as though the leases had been issued to them originally pursuant to an application therefor -----	712	"LEASE OWNER."	
DISCOVERY; SEGREGATED LEASES.		5. The language of section 17 of the act of February 25, 1920, as amended August 21, 1935, its legislative history and the practical construction given it by the Department, offer no support for the contention that the "lease owner" who is entitled to notice of cancellation of the lease, includes anyone interested in the substance of the lease who has communicated that fact to the General Land Office and obtained its approval of the same -----	661
3. As a result of the legal relationship established by the Secretary of the Interior, the assignor (original lessee) and the assignee of a portion of an oil and gas lease hold segregated leases which for all purposes are the same as though they had been issued separately, and either lease will continue beyond the initial term only if oil or gas is discovered and produced on that particular lease -----	712	NOTICE OF CANCELLATION; ACTUAL NOTICE.	
Cancellation of Leases; Act of February 25, 1920, as Amended August 21, 1935.		6. The failure to serve notice of cancellation of a lease in the manner prescribed by statute upon an operator in possession of the premises under an agreement with the lessee, is immaterial when the operator has actual notice of cancellation for the period prescribed by statute, even if the statute could be interpreted as requiring notice to such operator -----	662
NOTICE OF CANCELLATION; SERVICE UPON RECORD TITLEHOLDER.		NOTICE OF CANCELLATION; ABANDONMENT OF NOTICE.	
4. The requirements of section 17 of the act of February 25, 1920, as amended August 21, 1935, which prescribe a 30-day notice of intent to cancel an oil and gas lease to the "lease owner," are met by service of such notice upon the record titleholder of the lease -----	661	7. The statutory requirement of 30 days' notice before cancellation of an oil and gas lease does not require cancellation 30 days after notice has been given nor does the Department's failure to cancel immediately after the lapse of 30 days constitute abandonment of the notice -----	661

Oil and Gas Lands—Continued.

Cancellation of Leases; Act of February 25, 1920, as Amended August 21, 1935—Continued.

FORFEITURES.

8. Forfeitures of oil and gas leases are favored by the law and provisions for forfeiture are construed liberally in favor of the lessor and strictly enforced _____

661

EQUITIES JUSTIFYING REINSTATEMENT.

9. An operator who fails to show any actual expenditure of money or effort in the development of leased land cannot be regarded as having such equities in the land as to justify reinstatement of the lease after cancellation _____

662

Discovery of New Oil Field; Act of December 24, 1942.

RIGHTS TO ROYALTY.

10. The development of a well from which there was sustained production of oil from and after October 25, 1942, does not entitle the lessees on whose leased land the well was developed to the benefits of the act of December 24, 1942 (56 Stat. 1080), which offers a bounty in the form of a royalty rate of 12½ per cent for prospecting resulting in the discovery of a new field or deposit _____

546

RETROSPECTIVE EFFECT OF STATUTE; TIME OF EFFECTIVENESS OF STATUTE.

11. In the absence of an unequivocal expression of the legislative intent that a statute shall operate retrospectively its operation is prospective only _____

546

Oil and Gas Lands—Continued. Page

Discovery of New Oil Field; Act of December 24, 1942—Continued.

12. The provision in the act of December 24, 1942, that it shall be effective "during the period of the national emergency proclaimed by the President May 27, 1941," is not an unequivocal expression of the legislative intent that the statute shall be effective from and after May 27, 1941 _____

546

RELIEF STATUTE.

13. The rule that a relief statute should be liberally construed to include all those whom it was intended to benefit has no application to the act of December 24, 1942, which offers a bounty in the form of a reduced royalty rate for oil and gas prospecting on the public domain resulting in the discovery of a new field or deposit. Persons who do not discover oil as a result of prospecting which would not have been done except for the reward offered by the act of December 24, 1942, are not entitled to its benefits _____

546

TIME OF DISCOVERY.

14. The development of a well which produced an average of 226 barrels of oil and 328 barrels of water per day from and after October 25, 1942, cannot be regarded as a discovery of a new oil field after December 24, 1942 _____

546

Extension of Leases; Acts of December 22, 1943, and September 27, 1944; Lands Partly Within Known Producing Structure.

PREFERENCE RIGHTS; ACT OF JULY 29, 1942.

15. Statutory provisions granting preference rights to

Oil and Gas Lands—Continued.	Page	Oil and Gas Lands—Continued.	Page
Extension of Leases; Acts of December 22, 1943, and September 27, 1944; Lands Partly Within Known Producing Structure—Con.		Extension of Leases; Acts of December 22, 1943, and September 27, 1944; Lands Partly Within Known Producing Structure—Con.	
oil and gas leases are construed strictly in favor of a denial of the right where a case is not clearly within the scope of such provision-----	766	tember 27, 1944 (58 Stat. 755), even though the lessee has paid rental for the extended period on the entire lease at the rate of \$1 per acre. Only that part of the lands which is within a known producing structure on the date of the expiration of the lease is automatically extended by virtue of the provisions of those acts -----	767
PREFERENCE RIGHT TO NEW LEASE; ACT OF JULY 29, 1942.		PROTECTION OF LESSEE'S RIGHT TO PREFERENCE LEASE AND EXTENSION OF LEASE.	
16. Section 1 of the act of July 29, 1942 (56 Stat. 726, 30 U. S. C. 226b), grants a preference right to a new lease only with respect to that portion of the lands which is outside a known producing structure on the date of the expiration of the lease-----	767	19. A lessee of an oil or gas lease who is uncertain whether all or any portion of the lands covered by his lease will fall within the known geologic structure of a producing oil or gas field on the date of the expiration of the lease, and is consequently uncertain whether to apply for a new lease under the act of July 29, 1942 (56 Stat. 726), or to pay rental in order to obtain an extension of his lease under the acts of December 22, 1943 (57 Stat. 608), and September 27, 1944 (58 Stat. 755), with respect to the land in question, may, in order to protect his rights, proceed as though the land in question fell within the scope of both sections -----	767
EFFECT OF FAILURE TO APPLY FOR NEW LEASE OF LANDS OUTSIDE STRUCTURE.		AMBIGUOUS STATUTORY LANGUAGE; RETROSPECTIVE APPLICATION OF CONSTRUCTION.	
17. If no application for a new lease is made with respect to that part of the leased lands which is outside of a known producing structure within 90 days prior to the expiration date of a 5-year lease, the lease on such portion if nonproductive, is terminated at the end of the 5-year period -----	767	20. The Department's construction of ambiguous statu-	
LANDS PARTLY WITHIN PRODUCING STRUCTURE; EXTENSION OF LEASE.			
18. A lease of lands which are partly within a known producing oil and gas structure on the date of the expiration of the lease is not extended in its entirety under the act of December 22, 1943 (57 Stat. 608, 30 U. S. C. 226b), and the act of Sep-			

Oil and Gas Lands—Continued.

Extension of Leases; Acts of December 22, 1943, and September 27, 1944; Lands Partly Within Known Producing Structure—Con.

tory language which, on its face, is reasonably susceptible of a contrary interpretation will not be given retrospective application where such application would cause hardship and inequity _____

Leases; Approval of Operating Agreement.

21. The approval by the Secretary of the Interior of an agreement between the lessee and an operator does not give rise to a contractual relationship between the United States and the operator or create any privity of contract between the United States and the operator even though the agreement binds the operator to fulfill the lessee's obligation under the lease _____

Leases; Conflict With Mining Claim; Burden of Proof.

22. Where an oil and gas lease is issued on land shown by the records as free from adverse claim, the issuance of the lease is regular and the lease prima facie valid, notwithstanding the existence of an asserted mining location for which no application for patent has been filed, and the burden of proof is on the mineral claimant to show he has a superior right to the possession of the land and that the lease is consequently invalid _____

Leases; Regulations.

23. Circular 960 of August 19, 1924 (43 CFR, Cum. Supp.,

Oil and Gas Lands—Continued. Page

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Leases; Regulations—Continued.

192.41a), is applicable to 5- and 10-year leases issued under the amendatory act of August 21, 1935 (49 Stat. 674), as well as to 20-year leases issued theretofore, and the regulation is not inconsistent with section 2(p) of such 5- and 10-year leases _____

712

Relinquishment of Leases.

MAILING; COMPROMISE SETTLEMENT; ACT OF JULY 29, 1942.

24. Mere mailing of surrender of oil and gas lease is insufficient to stop accrual of rent. The Department must receive the relinquishment prior to due date of rental, but may make a compromise settlement under the act of July 29, 1942 (56 Stat. 726), where financially beneficial to the United States or where lessee's financial resources are limited _____

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Oil and Gas Leases, Indian Lands.

See, also, **Indians and Indian Lands.**

Advance Royalty Payments; Minimum Payments; Lease Forms.

1. Advance royalty payments are not minimum payments under lease form A approved April 20, 1908 (amended February 6, 1911, and June 29, 1911), used by the Five Civilized Tribes Indian Agency prior to 1925, nor under lease form 5-154h used prior to 1925 by Indian agencies other than the Five Civilized Tribes _____

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Oil and Gas Leases, Indian Lands—Continued.

Advance Royalty Payments; Minimum Payments; Lease Forms—Continued.

2. Under lease form 5-154h, adopted December 24, 1924, and used by all Indian agencies in Oklahoma (except Osage) from 1925 to 1933, the advance royalties constitute minimum payments required to be made until such time as royalties on production exceed the advance royalty payments _____

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3. The obligation of the lessees to make payment of advance royalties under leases executed on form 5-154h, adopted December 24, 1924, is not limited to the fixed or 10-year period but continues during subsequent periods of the lease subject to termination only by the completion of a well or wells producing oil or gas in quantities sufficient to return to the lessor an income in excess of the advance royalty payments _____

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4. Neither lease form A, used by the Five Civilized Tribes Indian Agency prior to 1925, nor lease form 5-154h, used prior to 1925 by Indian agencies other than the Five Civilized Tribes, requires the lessee to resume the payment of advance royalties after producing wells on the lease-holds cease to produce _____

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5. Under lease form 5-154h, in use by all Indian agencies in Oklahoma except Osage from 1925 to 1933, the lessee is obligated to resume the payment of advance royalties when the producing well or

Oil and Gas Leases, Indian Lands—Continued.

Advance Royalty Payments; Minimum Payments; Lease Forms—Continued.

wells cease to produce only during the fixed period of 10 years _____

263

6. Advance royalties must be paid in addition to the prescribed rental for a nonutilized gas well during the fixed period of the lease and any extension thereof by payment of the nonutilized gas rental _____

263

Assignment; Apportionment of Advance Royalties.

7. Where a lease, which has been continued in force after the fixed 10-year period by production returning stipulated royalties in excess of advance royalties, is assigned during a year in which production ceases or declines to the extent that the production royalties are less than the advance royalties, no question of apportionment of advance royalties as between the assignor and assignee can arise because the obligation to make the advance royalty payments had previously terminated and is not revived by cessation or decline of production _____

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Assignments; Allotted Lands.

8. The Department cannot validly approve assignments of oil and gas leases on allotted Indian lands unless it finds that the leases are still in effect _____

12

Extension Beyond Primary Term.

9. Where drilling operations were commenced during the primary term of an oil and gas lease, a showing must be made that the drilling operations were in conformity

Oil and Gas Leases, Indian Lands—Continued.

Extension Beyond Primary Term—Continued.

with applicable regulations in order to extend the lease beyond the primary term_____

10. Where an oil and gas lease provides that should the lessee be unable to market the production from the leased land he may, with the consent of the Secretary of the Interior, discontinue operation of the producing wells thereon, a lease may not be considered in force beyond its primary term if the lessee discontinues production because of the lack of storage facilities unless he has first obtained the consent of the Secretary of the Interior_____

11. An oil and gas lease may not be extended beyond its primary term where neither production nor the completion of a well commenced during the primary term is shown_____

Blackfeet Tribe.

TRIBAL CONSTITUTIONS, INTERPRETATION; SUBSEQUENT LEGISLATION.

12. A tribal constitution does not freeze acts of Congress in existence at the time of its adoption, and powers constitutionally vested in a tribal council are not limited by any such act after it has been repealed or superseded_____

POWERS OF TRIBAL COUNCIL; DEPARTMENTAL APPROVAL; PREFERENCE RIGHTS.

13. The Blackfeet Tribal Council is empowered, under the Blackfeet Constitution of December 13, 1935, and the act of May 11, 1938 (52 Stat.

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Oil and Gas Leases, Indian Lands—Continued.

Blackfeet Tribe—Continued.

347, 25 U. S. C. 396a *et seq.*), to issue tribal oil leases, with or without competitive bidding, subject to departmental approval, and subject to the requirement that members of the tribe enjoy a preference right to obtain such leases before they are issued to non-members _____

14. Such a lease is ineffective prior to departmental approval and the holder of such an unapproved lease has no rights against the holder of an approved lease to the same land even though the approved lease bears a later date of execution than the unapproved lease _____

DEPARTMENTAL APPROVAL OF LEASES; EFFECT OF APPROVAL AS TO FORM.

15. Departmental approval of a form of contract is not approval of a contract subsequently executed under such form _____

OIL DRILLING AGREEMENTS; RELIANCE ON UNAPPROVED LEASE.

16. Equitable circumstances may create a moral duty on the part of the Blackfeet Tribal Council and the Interior Department to offer a second lease as nearly equivalent as possible to one that was offered and accepted in good faith but never received final departmental approval _____

17. Where a lease was offered by the Blackfeet Tribal Council in good faith on a form approved by the De-

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Oil and Gas Leases, Indian Lands—Continued.	Page	Oil and Gas Leases, Indian Lands—Continued.	Page
Blackfeet Tribe—Continued.		Taxation.	
partment and the presumptive lessee accepted the lease and expended considerable sums in preparation for drilling thereunder, and such lease was not approved but the land covered by it was subsequently leased to another party, an equitable or moral obligation rests with the Tribal Council and the Department to offer another lease, as nearly equivalent as possible to the first, to one who has suffered by bona fide reliance on the validity of the unapproved lease _____	638	See subheading State Taxes Imposed on Royalty, Liability of Indian Tribes.	
Five Civilized Tribes.		Oil Drilling Agreements.	
See subheading Advance Royalty Payments, Minimum Payments, Lease Forms.		See Oil and Gas Leases, Indian Lands, subheading Blackfeet Tribe.	
Osage Tribe.		Olympic National Park.	
See subheading Advance Royalty Payments, Minimum Payments, Lease Forms.		See President's Authority, subheadings Utilization of Timber for War Purposes; Elimination of Lands.	
State Taxes Imposed on Royalty; Liability of Indian Tribes.		Oregon and California Railroad and Reconveyed Coos Bay Grant Lands.	
18. The act of May 29, 1924 (43 Stat. 244, 25 U. S. C. 398), authorizes the taxation by the States of the production of oil and gas on unallotted lands in all respects the same as production on unrestricted lands and authorizes the Secretary of the Interior to cause the tax assessed against royalty interests to be paid_____	535	Timber Sale Without Competitive Bidding; Act of August 28, 1937.	
19. The Ute Mountain and Blackfeet Tribes are liable for the taxes levied against their interests because all of the taxes sought to be collected on their royalty interests are within the permissive act of Congress _____	536	1. The sale of timber on the Oregon and California revested lands within sustained-yield forest units established under the act of August 28, 1937 (50 Stat. 874), may be consummated without competitive bidding and such timber is subject to disposal by other methods designed to secure a price reflecting its fair value. The competitive bidding requirement of the act of June 9, 1916 (39 Stat. 218), was repealed by the act of August 28, 1937_____	414
		Osage Tribe, Oklahoma.	
		See Indians and Indian lands; Oil and Gas Leases, Indian Lands, subheading Advance Royalty Payments; Secretary of the Interior. Authority, subheading Delegation.	
		Parkways.	
		See National Park Service.	

Patent Rights to Inventions.

See Inventions.

Patents.

See Railroad Land Grants;
Res Judicata.

Permits.

See Grazing and Grazing
Lands; Indians and Indian
Lands, subheading Rights-of-
Way, Transmission Lines;
Mineral Leasing Act; Mining
Claim; Rights-of-Way, sub-
heading Aerial Tramway,
Grand Canyon National Park;
Rights-of-Way, subheading
Electric Transmission Lines.

Philippine Government.

Responsibility for Obligations of
Manila Railroad Company; Pay-
ment in Absence of Specific or
Standing Appropriation; Effect of
General Ruling 10-A, Treasury
Department.

1. Under section 2(a)(7)
of the Philippine Independ-
ence Act (48 Stat. 456, 48
U. S. C. 1232(a)(7)) and sec-
tion 1(7) of the Ordinance
appended to the Constitution
of the Philippines, the Gov-
ernment of the Commonwealth
of the Philippines is made
responsible for the obligations
of the Manila Railroad Com-
pany because it was an in-
strumentality of the Philip-
pine Government at the time
of the adoption of the Philip-
pine Constitution. Payment
of debts on such obligations
by the Philippine Government
out of funds on deposit in the
United States, in the absence
of an appropriation therefor,
is unauthorized. The Com-
monwealth Government is
justified in refusing to make
such payments in view of the
prohibition of section (a)(1)
of General Ruling 10-A of the
Treasury Department _____

Pipe Lines.

See Rights-of-Way.

Placer Mining Claim.

See Mining Claim; Mineral
Leasing Act.

**Police Power, Federal, State
and County.**

See Indians and Indian
Lands, subheading Wind River
Reservation; National Parks
and Monuments, subheading
Domestic Animals Trespass-
ing; National Park Service,
subheading County Roads;
United States, subheading
Lands Acquired in Trust for
Indians.

**Porters' Lodges and Superin-
tendents.**

See National Cemeteries.

Practice and Rules of Practice.

See, also, Rules of Practice,
Table, p. LXXIX.

**Contest; Liability of Contest Party
for Costs of Record; Deposit for
Costs.**

1. Under departmental
Rules of Practice each party
to a contest is liable for pay-
ment of the costs of the record
he makes and must make a
deposit to cover such costs
before the contest hearing is
held. A contestee who refuses
to make such deposit is not
entitled to offer evidence, to
participate in the hearing or
even to introduce into the re-
cord any papers which require
notation _____

**Contest Hearing; Absence of Pre-
siding Officer.**

2. The absence of an officer
before whom a hearing is held
during the taking of testimony
does not affect the regularity
of the proceedings so long as

Practice and Rules of Practice —Continued.	Page	Practice and Rules of Practice —Continued.	Page
Contest Hearing; Absence of Presiding Officer—Continued.		Filing of Motions for Rehearing—Continued.	
the officer is present when any rulings are made in which the objecting party is concerned___	670	after receipt of notice of the decision complained of (43 CFR 221.81) and the filing of supplements thereto after that time is not contemplated_____	427
Contest Hearing; Register's Discretionary Authority to Fix Time and Place.		Grounds for Rehearing.	
3. Under departmental Rules of Practice the register has authority to fix the time and place of a contest hearing and his action will not be interfered with unless he exceeds his authority. It is not abuse of discretion to fix a place for hearing at which witnesses living in the vicinity of the lands in controversy can be compelled to attend by subpoena _____	670	6. No proper ground for rehearing is offered by the presentation of cumulative evidence which, if proved, would warrant no change of decision, and as to which there is no showing that with due diligence it was impossible to present it at the hearing _____	427
Contest Hearing; Register's Discretionary Authority to Grant Continuances.		Motion for Supervisory Authority; Authority of Commissioner.	
4. The granting or denial of a request for continuance is within the discretionary authority of a hearing officer. It is not abuse of such discretion to deny a request for continuance on the ground of illness in the requesting party's family when there is no showing that such illness was the cause of the party's absence from the hearing; it is not abuse of such discretion to deny request for continuance on the ground that the requesting party is engaged in national defense work when there is no showing that the party was prepared or intended to offer testimony at the hearing _____	670	7. A party aggrieved by final decision of the Department may reopen the case by motion for exercise of supervisory authority of the Secretary under Rules of Practice (Rule No. 85, 43 CFR 221.82), but the Commissioner of the General Land Office is without authority to disregard a departmental decision _____	550
Filing of Motions for Rehearing.		New Trial.	
5. Motions for rehearing should be filed within 30 days _____		8. Motion for new trial submitted after appeal to the Secretary comes too late under the regulations (43 CFR 221.41-221.44) but will be considered on its merits under the ruling in <i>United States v. State of California</i> , 55 I. D. 532 _____	427
		Preference Right.	
		See Oil and Gas Lands, subheading Extension of Leases; Oil and Gas Leases, Indian Lands, subheading Blackfeet	

Preference Right—Continued.

Tribe, Powers of Tribal Council.

President's Authority.

See, also, Mineral Leasing Act, subheading Public Lands Acquired for Specific Purpose; Ramspeck Act.

Olympic National Park.

UTILIZATION OF TIMBER FOR
WAR PURPOSES; WAR
POWERS.

1. It is doubtful whether the President may, pursuant to his war powers, authorize the disposition of timber within the Olympic National Park without regard to the prohibitions contained in the National Park statutes -----

480

ELIMINATION OF LANDS.

2. In the absence of authority from Congress, the President is without authority to vary the status of lands devoted by him to a specific use pursuant to congressional authorization. Federal lands may be transferred between departments only by legislative authority. Since no legislative authority for change of use or transfer between departments exists in this case, the President is without authority to eliminate them from the Park and restore them to the National Forest -----

480

**Public Lands Acquired for Specific
Purpose; Protection from Oil and
Gas Drainage.**

3. The President has implied authority to take protective measures in cases where lands acquired for a specific public purpose are found to contain oil and gas which is

Page President's Authority—Con.

Page

**Public Lands Acquired for Specific
Purpose; Protection from Oil and
Gas Drainage—Continued.**

being drained by adjoining owners, which authority is vested in the department or agency having jurisdiction over the land, but may be transferred to another department by Executive order-----

523

Property Damage.

See Damage Claims.

Protest.

See Color of Title; Mining Claim; Res Judicata.

Public Lands.

See, also, Drainage, subheadings Arkansas, Minnesota; Forest Lieu Selections; Homestead; Mineral Leasing Act; Oaths; Reclamation; Trespass; Withdrawal of Public Lands.

Accretion and Avulsion.

1. According to the plat of survey of 1845 two tracts of public land in Arkansas had for their east boundary the west bank of the Mississippi River. Between 1843 and 1880 the waters of the river gradually eroded and submerged all of the land within the tracts and land to the west thereof and the main channel of the river ran west of the tracts, but following this submergence, land in the form of a sand bar reappeared within the boundaries and to the full extent of the tracts, the reappearance being caused by the westerly recession of the waters and by accretion to private land in Tennessee which in 1880 had attained an

Public Lands—Continued.

Accretion and Avulsion—Continued.

elevation of from 5 to 10 feet above the river. By an avulsive change in the course of the river in 1912, the main channel of the river ran southeast of the land. The boundary of the Mississippi River between Arkansas and Tennessee was fixed by the Supreme Court on June 3, 1940. A supplemental survey by the General Land Office disclosed that but 2.02 acres of one of the tracts were in Arkansas, the remainder of the two tracts being in Tennessee. In April 1934 homestead entry was allowed for the two tracts according to the original plat of survey, which subsequently to the filing of supplemental plat of survey was reduced to the 2.02 acres remaining in Arkansas.

Held, (1) that the reappearance of the land was the result of gradual accretion to the land in Tennessee before the avulsive change in the river channel and the avulsion was not the cause of its reappearance; (2) that when the land became a part of the bed of the Mississippi River, the title thereto became vested in the State or States within whose boundaries it was situated, and upon its reappearance, the title to the land was governed by the State law; (3) that neither the laws of Arkansas nor Tennessee, as interpreted by its highest court, afford sufficient basis for holding that the reappeared land became the property of the United States, and if the Department should so hold, its holding would not

Page

Public Lands—Continued.

Accretion and Avulsion—Continued.

bind an adverse claimant; (4) that considering the act of August 7, 1846 (9 Stat. 66), ceding to Tennessee the public land south of the Congressional Reservation Line and the legislative history of the act, it is believed to have been the intent and purpose of Congress, in order to settle all controversy with the State and to rid the Federal Government of all administration of the remnants of public lands in the State, to divest itself of all ownership and jurisdiction over the public lands in Tennessee at once and forever, and though the act of cession at the time of its enactment passed the title only to the land ceded by North Carolina, it seems improbable that it was the intention that the United States was to retain its ownership and apply its system of disposition under the public land laws to small fragments of public lands in Arkansas that were washed away by gradual changes in the channel of the river, but subsequently reappeared in the State of Tennessee; (5) that it had not been satisfactorily shown that the lands in either Arkansas or Tennessee are public lands subject to disposition under the public land laws, and there was no sufficient reason for surveying any part of them as such _____

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242

Pueblos.

See Indians and Indian Lands.

Puerto Rico.**Citizenship of Puerto Ricans.****TREATY PROVISIONS; ORGANIC ACTS.**

1. A person born in Puerto Rico of native parents prior to its cession by Spain to the United States under the treaty of peace ratified on April 11, 1899, who did not elect thereunder to remain a subject of Spain, became a citizen of Puerto Rico under the provisions of the Foraker Act of April 12, 1900 (31 Stat. 77, 79, 48 U. S. C. 733), and acquired the status of a naturalized citizen of the United States under the provisions of the Jones Law of March 2, 1917 (39 Stat. 951, 953, 8 U. S. C. 602, note)-----

135

NATIONALITY ACT OF 1940; EFFECT OF ABSENTEEISM.

2. A Puerto Rican who has become a naturalized United States citizen in the aforementioned manner is subject to the provisions of section 404(c) of the Nationality Act of 1940 and hence will lose his nationality if he has resided continuously for five years in any foreign state, unless he returns to the United States before two years after the date of the approval of that act -----

135

Constitutionality of Statutes.

3. Opinions will not be rendered on the constitutionality of a statute unless statutory duties alleged to be in conflict with constitutional limitations are placed upon the executive department-----

54

4. Where the constitutionality of certain Puerto Rican statutes has been called into question by the Attorney

Page Puerto Rico—Continued.**Page****Constitutionality of Statutes—Con.**

General of Puerto Rico and the Auditor of Puerto Rico, a Presidential appointee, is in doubt whether to follow the said statutes, the Secretary of the Interior may properly advise as to the constitutionality thereof, insofar as they bear upon the duties of the Auditor -----

54

Independent Governmental Instrumentalities.

5. The Puerto Rico Water Resources Authority, the Puerto Rico Transportation Authority, the Puerto Rico Communications Authority, and the Puerto Rico Development Company are constitutionally valid independent agencies not parts of any executive department or bureau -----

54

Independent Governmental Instrumentalities; Auditing.

6. Independent instrumentalities of the Government of Puerto Rico may be exempted from usual forms of auditing without violation of the Organic Act of Puerto Rico--

54

Proviso in Appropriation Act Limiting Use of Funds During Service of Designated Executive Officer, Puerto Rico.

7. See Legislation.

Pumice.

See Withdrawal of Public Lands, subheading Reclamation.

Railroad Land Grants.

Act of June 22, 1874; Transportation Act of 1940; Release of Claims; Claims to Land Not Arising Under Original Granting Act.

1. The act of June 22, 1874 (18 Stat. 194), which gave the

Railroad Land Grants—Con.

Page

Act of June 22, 1874; Transportation Act of 1940; Release of Claims; Claims to Land Not Arising Under Original Granting Act—Continued.

land-grant railroad companies an option to relinquish or reconvey to the United States lands included within the grant and in the possession of settlers whose rights arose subsequent to the rights of the railroad company and to select in lieu thereof other land within the limits of the grant, is a grant of land in aid of the construction of a railroad the same as the original granting act _____

596

2. The act of June 22, 1874, is an additional grant conditioned upon the relinquishment of a portion of the original grant and the exercise of the right to select other land in lieu thereof _____

596

3. A railroad company's release of all claims under any act of Congress to itself or to any predecessor in interest, in aid of the construction of a railroad, filed pursuant to section 321(b) of the Transportation Act of 1940, includes a claim, arising under the act of June 22, 1874, to land to be selected in lieu of land acquired under the original grant of land and such claim is extinguished by the filing of such release _____

596

Act of April 28, 1904; Transportation Act of 1940; Release of Claims; Claims to Land Not Arising Under Original Granting Act.

4. The act of April 28, 1904 (33 Stat. 556), which gave the Santa Fe Pacific Railroad Company, as successor of the Atlantic and Pacific Railroad Company, an option

Railroad Land Grants—Con.

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Act of April 28, 1904; Transportation Act of 1940; Release of Claims; Claims to Land Not Arising Under Original Granting Act—Continued.

to relinquish or reconvey to the United States, at the request of the Secretary of the Interior, land granted to it in aid of the construction of a railroad and to select in lieu thereof other vacant public land of equal quality in the Territory of New Mexico, is a grant of land in aid of the construction of a railroad_____

601

5. The Santa Fe Pacific Railroad Company's release of all claims under any act of Congress to Santa Fe Pacific Railroad Company or any predecessor in interest, in aid of the construction of a railroad, filed pursuant to section 321(b) of the Transportation Act of 1940, includes a claim, arising under the act of April 28, 1904, to land to be selected in lieu of land acquired under the original grant of July 27, 1866, and such claim is extinguished by the filing of such release _____

602

Application for Patent; Regulations of December 10, 1941; Transportation Act of 1940; Release of Claims; Burden of Proof to Establish Exception.

6. Under the departmental regulations of December 10, 1941, a railroad company asserting a right to patent on the ground that the land for which patent is sought was excepted from a release filed pursuant to section 321(b) of the Transportation Act of 1940, under the innocent purchaser provision of the saving clause of this section, must show conclusively that

Railroad Land Grants—Con.

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Application for Patent; Regulations of December 10, 1941; Transportation Act of 1940; Release of Claims; Burden of Proof to Establish Exception—Continued.

the alleged purchaser is entitled to the estate transferred by the patent _____ 597, 602

Indemnity Lands.

ASSIGNMENT OF SELECTION RIGHT.

7. The right to select indemnity lands cannot be assigned so that the assignee may exercise the right as successor to the grantee and a transfer of the benefits to accrue from the exercise of the grantee's right of selection gives the transferee no greater rights than the grantee then has _____

591

DOCTRINE OF THE NORTHERN PACIFIC CASES; NECESSITY OF SELECTION.

8. Although under the doctrine of the *Northern Pacific Cases* the United States is precluded from depriving a railroad company of its right to indemnity lands by appropriating such lands for public purposes when losses in the place lands exceed the available indemnity lands the railroad company acquires no title to indemnity lands in the absence of selection _____

578

GRANTEE'S RELEASE OF ITS UNEXERCISED RIGHT TO SELECT INDEMNITY LANDS.

9. A grantee railroad company's release of all claims under a railroad land grant extinguishes the company's unexercised right to select indemnity land _____

578

Railroad Land Grants—Con.

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Indemnity Lands—Continued.

NATURE OF RIGHT TO SELECT INDEMNITY LANDS.

10. The right to select indemnity lands is in the nature of a grant of power dependent upon a future contingency which attaches to no specific lands until it is exercised _____ 578

SELECTION OF INDEMNITY LAND; IDENTIFICATION BY SURVEY.

11. The selection of indemnity land identifies the specific sections of land to which the rights of the railroad company attach, but because specific sections of land do not exist before survey, indemnity lands cannot be identified prior to survey _____ 578

TITLE TO INDEMNITY LANDS; PURPORTED SALE OF UNSELECTED INDEMNITY LANDS.

12. A railroad company acquires no title to indemnity lands prior to the exercise of its right of selection and a purported sale of unselected land within the indemnity limits of a railroad land grant is without effect except as it may operate as a contract to convey or an assignment of the benefits which will accrue when the right to select has been exercised _____ 578, 588

Innocent Purchasers; Notice of Defects in Title.

13. Purchasers of land are charged with notice of all defects in title indicated by the recitals in the deeds in the chain of title _____ 579

Railroad Land Grants—Con.

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Jurisdiction to Determine Rights of Persons Claiming Through the Grantee; Issuance of Patents.

14. The railroad land grants confer upon this Department no jurisdiction to determine the rights of persons asserting claims to granted land under contracts with the grantee..... 591

15. In the absence of legislative or judicial recognition of a claimant as a successor of the grantee, the Department issues patents to the grantee even though the grantee has assigned its rights to another 591

Place Lands and Indemnity Lands; Vesting of Title.

16. A congressional grant to a railroad company of the odd-numbered sections on either side of a railroad to be built constitutes an offer which ripens into a contract when the railroad company indicates its acceptance by filing a map of location showing the route of the road and on location of the road the company acquires an estate in the specifically granted place lands which relates back to the date of the granting act 578

17. The right to select indemnity land to replace losses in the place lands becomes an estate in land only when losses in the place lands have been ascertained and the right to select has been exercised... 578

18. A railroad land grant confers no right to specific lands within the indemnity lands until the grantee's right of selection has been exercised. Title to indemnity land vests when an approved selection has been made..... 591

Railroad Land Grants—Con.

Page

Transportation Act of 1940, Section 321(b); Patents to Innocent Purchasers; Release of Claims; Exceptions; Selection of Lands.

19. The language of section 321(b) of the Transportation Act of 1940 which permits the Secretary of the Interior to issue patents confirming the title to such lands as he shall find have been sold to an innocent purchaser for value, indicates the intent of Congress to insure the survival of some rights to railroad grant lands but it does not authorize the Secretary to issue patents in instances where the right does not exist irrespective of this statute 577

20. A transfer of a railroad company's right to unselected indemnity lands is not a sale of land within the meaning of the saving clause of section 321(b) of the Transportation Act of 1940 so that patent may be issued for the benefit of an innocent purchaser for value 588, 592

21. The saving clause of section 321(b) of the Transportation Act of 1940 authorizes the exception from the release of claims under the land grants of patented lands, lands sold to innocent purchasers for value and lands selected and the selection fully and finally approved by the Secretary of the Interior to the extent that the issuance of patent may be authorized by law 602

22. The final provision of the saving clause of section 321(b) of the Transportation Act of 1940 does not authorize the exception from a release of claims filed pursuant to this section of claims to land

Railroad Land Grants—Con.

Transportation Act of 1940, Section 321(b); Patents to Innocent Purchasers; Release of Claims; Exceptions; Selection of Lands—Continued.

for which a selection list has been filed but not finally approved by the Secretary of the Interior -----

Transportation Act of 1940; Central Pacific Railway; Release of Claims; Restored Lands; Requisites to Availability for Classification and Disposal; Congressional Assistance Re Status; Taylor Grazing Act; Settlement Barred.

23. Lands released under the Transportation Act of 1940 are "restored" lands, which are available neither for disposal nor for classification until appropriate indication of such availability shall have been given by the Government and notation of restoration shall have been made on the records -----

24. Action looking to the disposal of such lands will not be taken pending congressional action on legislation recommended by the Department to fix their status -----

25. By virtue of the Taylor Grazing Act of 1934, rights of settlement may no longer be initiated -----

Railroad Rights-of-Way.

See Rights-of-Way; Taylor Grazing Act and Lands, subheading State Exchanges.

Ramspeck Act.

Federal Employees.

FIELD APPOINTMENTS; CIVIL SERVICE STATUS.

1. Title I of the Ramspeck Act of November 26, 1940 (54 Stat. 1211, 5 U. S. C. 631(a))

Ramspeck Act—Continued.

Federal Employees—Continued.

et seq.), restored to the President the general authority granted under the Civil Service Act of 1883 to bring into the classified civil service excepted positions by Executive order, provided employees holding such positions meet specified qualifications. The President exercised this authority by issuing Executive Order No. 8743, on April 23, 1941, covering into the classified civil service "all offices and positions in the executive civil service of the United States," with certain specific exceptions -----

POSITION AND SALARY;
CLASSIFICATION STATUS.

2. Title II of the Ramspeck Act of November 26, 1940 (54 Stat. 1212, 5 U. S. C. 631 *et seq.*), is unconnected with Title I of the act. It requires the issuance of an Executive order to give it effect. It permits the President to extend the position and salary classification act to field positions, with certain exceptions, not at the time of its passage covered by the Classification Act of 1923. Until such time as an Executive order issues under Title II, the procedure theretofore prescribed for filling field positions, so far as salary or compensation rates or any limitations thereon are concerned, still is in effect -----

Receipt and Release Agreements.

See Secretary of the Interior, Authority, subheading Delegation.

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Reclamation.

See, also, Bureau of Reclamation; Soil and Moisture Conservation Activities.

Sale of Unproductive Lands; Act of May 16, 1930; "Resident Farm Owner," "Resident Entryman."

1. Authority to sell lands designated under the act of May 25, 1926, as temporarily unproductive or permanently unproductive, to resident farm owners and resident entrymen on Federal irrigation projects, was given the Secretary by the act of May 16, 1930 (46 Stat. 367, 43 U. S. C. 424, 424a). This act and the homestead law are *in pari materia*. "Resident entryman" means a homestead entryman who is actually residing on the land in his homestead entry, and "resident farm owner" means a farm owner who is actually residing on the farm he owns

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Reclamation Withdrawal.

See Withdrawal of Public Lands.

Rehearing.

See Homestead, subheading Military Service; Practice and Rules of Practice; Res Judicata; Soldiers' and Sailors' Civil Relief Act of 1940.

Relief Statute.

See Statutory Construction.

Reorganization Plan No. IV.

See Soil and Moisture Conservation Activities.

Res Judicata.

1. The principle of *res judicata* has no application to proceedings in the Department relating to disposition of the public domain until legal title passes, and findings and decisions are subject to revision

Res Judicata—Continued.

Page

in proper cases. Where an expert witness in a former proceeding subsequently changes his opinion on a material issue of fact, the determination of which is entirely dependent upon the reasoning of such experts, another hearing may be ordered _____

426

2. A decision in a patent proceeding that the land is coal in character is *res judicata* and will not be disturbed in an action initiated by protest against issuance of oil and gas leases unless clearly proved to be wrong _____

550

Restorations from Withdrawals.

Governed by Section 7 of Taylor Grazing Act; may not be in derogation of purpose of withdrawal.

1. See Forest Lieu Selections _____ 277-279, 296-298

Retrospective Operation of a Statute.

See Statutory Construction.

Revised Statutes.

See Table of Statutes cited, p. LXIII.

Rights-of-Way.

See, also, Indians and Indian Lands; Taylor Grazing Act and Lands, subheading State Exchanges, Railroad Right-of-Way.

Aerial Tramway, Grand Canyon National Park.

1. Section 5 of the act of February 26, 1919 (40 Stat. 1175, 16 U. S. C. 221), does not authorize the issuance of a permit to construct an aerial tramway across a portion of the Grand Canyon National Park where such a tramway would mar the Park's scenic

Rights-of-Way—Continued.

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Aerial Tramway, Grand Canyon National Park—Continued.

beauty. And any privilege which the owner of mining property within the Park may have had under the act of January 21, 1895 (28 Stat. 635, 43 U. S. C. 956), to apply for a permit to use a tramroad across these lands before they were converted into a national park, expired upon enactment of the act of February 26, 1919

776

Ditches and Canals; Pipe Lines, Water for Domestic Use.

2. A right-of-way under section 1 of the act of August 30, 1890 (26 Stat. 391, 43 U. S. C. 945), is not limited in its use to the transportation of water for irrigation purposes but may be used to carry water for domestic purposes

490

Ditches, Canals or Reservoirs; Revised Statutes Sec. 2339; Subsequent Right-of-Way Acts; Trespass.

3. Status of right-of-way clause of section 2339 of the Revised Statutes: *Held*, (1) the right-of-way clause of section 2339, Revised Statutes, has been superseded by subsequent right-of-way statutes; (2) persons constructing ditches, canals, or reservoirs upon the public lands without compliance with the appropriate departmental right-of-way regulations are in trespass

29

Electric Transmission Lines; Conditions of a Grant; Departmental Regulations of December 14, 1942.

DISCRETIONARY AUTHORITY OF DEPARTMENT HEADS; ACT OF MARCH 4, 1911; VESTING OF RIGHTS.

4. Under the act of March 4, 1911 (36 Stat. 1253), authorizing the heads of depart-

Rights-of-Way—Continued.

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Electric Transmission Lines; Conditions of a Grant; Departmental Regulations of December 14, 1942—Continued.

ments having jurisdiction over public lands to prescribe the terms of the grants of rights-of-way over such lands and to refuse such grants as are incompatible with the public interest, such department heads have discretionary authority to grant or to refuse an application for right-of-way. Because the grantors have such discretion an applicant acquires no vested right in advance of the actual grant of a right-of-way and must accept the conditions of the grant defined by departmental regulations in force at the time of the grant rather than the regulations in force when the application is filed

607

IDENTICAL CONDITIONS; ACT OF FEBRUARY 15, 1901; ACT OF MARCH 4, 1911.

5. The adoption of departmental regulations prescribing identical conditions of the grant of a revocable permit under the act of February 15, 1901, and of an easement for a fixed term of years under the act of March 4, 1911, does not reduce the grant of an easement authorized by the act of 1911 to the level of the permit authorized by the act of 1901

607

SECTION 6(a) OF AGREEMENT; USE OF LANDS WITHOUT LIABILITY; INCREASED COST OF IMPROVEMENTS.

6. The inclusion of section 6(a) in the agreement enumerating the conditions of the grant of an easement which reserves to the United States

Rights-of-Way—Continued.

Page

Electric Transmission Lines; Conditions of a Grant; Departmental Regulations of December 14, 1942—Continued.

the right (a) to use the right-of-way lands for public purposes without liability to the grantee and (b) to require the grantee to pay any increased cost of improvements made by the United States because of the grantee's use of the land, is reasonably required in the public interest and is justified by the same considerations which justify section 245.21(i) of the regulations_____

608

SECTION 245.21(h) OF REGULATIONS; UNIFORM ACCOUNTING SYSTEM.

7. The provisions of section 245.21(h) of the regulations of December 14, 1942, which permit the Secretary of the Interior to prescribe a uniform accounting system for grantees of rights-of-way are a necessary means of insuring uniform reports which is within the discretionary authority of the Secretary, but because the purposes of the Department are fulfilled by the grantee's adoption of a system of accounting prescribed by the Federal Power Commission it is desirable that this section of the regulations should be qualified by a proviso that adoption of such system shall be deemed compliance with the requirement of this section _____

608

SECTION 245.21(i) OF REGULATIONS; USE FOR POWER PURPOSES; CONDITIONAL RIGHT OF REVOCATION.

8. The provisions of section 245.21(i) of the regulations of

Rights-of-Way—Continued.

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Electric Transmission Lines; Conditions of a Grant; Departmental Regulations of December 14, 1942—Continued.

December 14, 1942, which require the grantee of a right-of-way to consent to the reservation by the United States of the right to use the right-of-way land for power purposes are not inconsistent with the concept of an easement___

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9. Even the reservation of a conditional right to revoke the grant of an easement may be required when necessary for the legitimate protection of the United States_____

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SECTION 245.21(q) OF REGULATIONS; COMPLIANCE WITH STATE REGULATIONS.

10. The provisions of section 245.21(q) of the regulations of December 14, 1942, which require the grantee of a right-of-way over public lands of the United States to agree to comply with State regulation of service and rates is applicable only insofar as a grantee is subject to such State regulation and it is desirable that this section of the regulations should clearly express such intent_____

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SECTION 245.21(r) OF REGULATIONS; TRANSFER OF RIGHT-OF-WAY; FEDERAL POWER COMMISSION.

11. The provisions of section 245.21(r) of the regulations of December 14, 1942, which permit the Secretary of the Interior to require the transfer of a right-of-way, together with the structures and equipment of the grantee on the right-of-way lands, to the person who has previously acquired other property of the

Rights-of-Way—Continued.

Electric Transmission Lines; Conditions of a Grant; Departmental Regulations of December 14, 1942—Continued.

grantee which is dependent upon the use of the right-of-way for its usefulness, are not inconsistent with the concept of an easement_____

12. The provisions of section 245.21(r) which give the Secretary of the Interior a conditional right to require transfer of a right-of-way operate concurrently with the authority of the Federal Power Commission to approve sales of property in excess of \$50,000 _____

INCORPORATION OF ALL RESTRICTIONS IN ONE INSTRUMENT.

13. The incorporation in one instrument of all the restrictions upon the use of a right-of-way over public lands of the United States required by the various public activities administered by a number of administrative agencies which may be affected by the grant of a right-of-way, does not increase the conditions to which the grant is subject_____

CONTRACTS; CONFLICT WITH STATUTE.

14. The terms of a contract which are inconsistent with the express provisions of a statute cannot be permitted to operate in derogation of law _____

Railroad: Estate in Right-of-Way, Northern Pacific Railroad Company; Limitation of Use to Railroad Purposes; Extraction of Underlying Minerals; Immateriality of Noninterference with Railroad Uses.

15. The right-of-way granted to the Northern Pacific

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Rights-of-Way—Continued.

Page

Railroad; Estate in Right-of-Way, Northern Pacific Railroad Company; Limitation of Use to Railroad Purposes; Extraction of Underlying Minerals; Immateriality of Noninterference with Railroad Uses—Continued.

Railroad Company by section 2 of the act of July 2, 1864 (13 Stat. 365), is a limited fee upon an implied condition of reverter. Section 3 of that act which conveyed an absolute fee in the odd-numbered sections which it granted does not apply to the segments of the right-of-way over odd-numbered sections. The right-of-way grant is for railroad purposes only. It conveyed no interest in the underlying minerals since their extraction is not essential for such purposes. Nor is it material that a proposed use for other than railroad purposes will not interfere with the continued operation of the railroad_____

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Riparian Rights.

See Public Lands, subheading Accretion and Avulsion.

Rocky Mountain National Park.

See National Park Service, subheading County Roads.

Royalties.

See Indians and Indian Lands, subheading Osage Tribe; Inventions; Oil and Gas Lands; Oil and Gas Leases, Indian Lands.

Rules of Practice.

See Practice and Rules of Practice; Table, p. LXXIX.

San Carlos Irrigation Project.

See Indians and Indian Lands, subheading Irrigation Project.

School Land Grants.

Minerals.

1. See Taylor Grazing Act and Lands, subheading State Exchanges.

Scrip and Dealers in Public Land Rights.

Abuse of Forest Lieu Selection Rights as if Scrip.

1. "Additional" selections.....275,
305, 309-310
2. Private assignment by double powers of attorney.....273, 283,
284, 294-296

Scrip Treatment of Forest Lieu Selection Rights Discountenanced.

1. Under Forest Lieu Legislation, Department lacks power to *prevent* assignments but refuses to *recognize* them283, 294-296

Secretary of the Interior, Authority.

See, also, Alaska, subheading Fish Trap Sites; Forest Lieu Selections; Forest Lieu Selection Statutes; Indians and Indian Lands; Indian Tribes; Inventions; Mineral Leasing Act; National Parks and Monuments; National Park Service; Oil and Gas Lands; Oil and Gas Leases, Indian Lands; Oregon and California Railroad Grant Lands; Railroad Land Grants; Reclamation; Rights-of-Way; Soil and Moisture Conservation Activities; Strategic Minerals and Metals; Taylor Grazing Act and Lands.

Delegation of Administrative Power; Heads of Bureaus.

1. The Secretary, as the head of the Department of the Interior, has the general power of delegating those

Secretary of the Interior, Authority—Continued.

Delegation of Administrative Power; Heads of Bureaus—Continued.

functions that fall within the province of the various bureaus of the Department to the respective heads of such bureaus, even though the discharge of such functions involves the exercise of judgment or discretion. This power is derived not only from section 161 of the Revised Statutes but also from the multifarious character of the duties of the Secretary, and the relationship between the Secretary and the heads of the bureaus. The vesting of a power in the "Secretary" rather than the "Department" of the Interior is usually not significant since these terms are as a rule used interchangeably in legislation and legislative debate 499

Delegation of Administrative Power; Commissioner of Indian Affairs.

INDIAN LANDS; SALE OF ALLOTED LANDS; INHERITED INTERESTS IN ALLOTED LANDS.

2. The Secretary of the Interior may, subject to existing rules and regulations and the decisions and practices of the Department, delegate to the Commissioner of Indian Affairs his powers in connection with the alienation of Indian lands. Undue weight should not be given to variations of phraseology in the relevant statutes since the administration of Indian property should be considered as a single activity dominated by common conceptions of policy in particular phases of its

**Secretary of the Interior,
Authority—Continued.**

**Delegation of Administrative Power;
Commissioner of Indian Affairs
—Continued.**

history. The debates concerning the relevant legislation and the size of the subsequent appropriations to carry it out reveal a full awareness on the part of Congress that the real decisions as to the alienation of Indian property were made in the Indian Office, and that they were departmental rather than personal. Although some of the early statutes require the Secretary's "approval," such a provision should be regarded only as equivalent to the requirement that the action to be taken should be left to the Secretary's discretion,—a form of provision which does not in itself prevent delegation by the head of a department. Although the act of March 1, 1907 (34 Stat. 1015, 1018, 25 U. S. C. 405), and section 1 of the act of May 29, 1908 (35 Stat. 444, 25 U. S. C. 404), entrust the management of the proceeds derived from any disposition to the Commissioner of Indian Affairs, it would be misleading to imply a presumption against delegation of a function entrusted to the Secretary merely because another has been entrusted to the Commissioner, especially since the separate allocation of each of the functions does not prevent the Secretary from exercising both, and its only practical effect is to enable the Commissioner to act without awaiting instructions from the Secretary. It is significant that section 1 of the final act of June 25, 1910 (36

**Secretary of the Interior, Page
Authority—Continued.**

**Delegation of Administrative Power;
Commissioner of Indian Affairs
—Continued.**

Stat. 855, 25 U. S. C. 372), contains the provision: "All sales of lands allotted to Indians authorized by *any* other Act shall be made under such rules and regulations and upon such terms as the Secretary of the Interior may prescribe,"—a form of provision which clearly supports a power of delegation. While the alienation of restricted land is a matter of more than routine importance, and the Indian is a ward of the United States, these considerations go only to the policy of delegation. If regarded as decisive in determining the legal power to delegate, they would prevent any delegation in the field of Indian affairs_____

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**INDIAN LANDS; DETERMINA-
TION OF HEIRSHIP AND AP-
PROVAL OF WILLS.**

3. Under sections 1 and 2 of the act of June 25, 1910 (36 Stat. 855, 856, 25 U. S. C. 372, 373), and the act of December 24, 1942 (56 Stat. 1080), the Secretary of the Interior may, subject to appeal to himself, delegate to the Commissioner of Indian Affairs power to determine heirs and approve wills, under applicable regulations, which prescribe the governing factors and the procedure in minute detail. While this function of the Secretary is quasi-judicial, it has little or no discretionary aspect. The original requirement of section 2 of the act of June 25, 1910, that wills must be approved by the Com-

Secretary of the Interior,
Authority—Continued.

Delegation of Administrative Power;
Commissioner of Indian Affairs
—Continued.

missioner of Indian Affairs, as well as by the Secretary of the Interior, was repealed by the act of February 14, 1913 (37 Stat. 678, 25 U. S. C. 373), and the repeal must be regarded as deliberate. Moreover, the motive originally may have been not so much to secure the personal approval of both the Commissioner and the Secretary, but to save the time of the latter by permitting the former to disapprove the will, so that no further action by the Secretary would be necessary -----

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INDIAN LANDS; ADVANCE
AUTHORIZATIONS FOR SALE
OF RESTRICTED LANDS
PLEGGED AS SECURITY FOR
LOANS.

4. The Secretary of the Interior may delegate to the Commissioner of Indian Affairs authority to approve advance authorizations for the sale of restricted lands pledged to tribes as security for loans made to Indian chartered corporations. While it is true that the execution of the form, which cannot be revoked by the Indian debtor, creates in effect an encumbrance on restricted land, it is in favor of the United States against whom the restrictions do not run and in any event the ultimate approval of the conveyance would constitute necessarily an approval of a prior encumbrance. The delegation could, therefore, be made even if the approval of

Secretary of the Interior, Page
Authority—Continued.

Delegation of Administrative Power;
Commissioner of Indian Affairs
—Continued.

the conveyance were not delegable -----

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INDIAN LANDS; APPROVAL OF
"RECEIPT AND RELEASE
AGREEMENTS"; FIVE CIV-
ILIZED TRIBES.

5. The Secretary of the Interior may delegate to the Commissioner of Indian Affairs authority to approve "Receipt and Release Agreements" settling claims of damage to allotted lands of the Five Civilized Tribes. Whatever the precise nature of these agreements, they are contracts affecting restricted land which are subject to approval by the Secretary under the terms of the statutes governing the lands of the Five Civilized Tribes. Since the Secretary may delegate authority to remove restrictions, he may obviously also delegate the authority to approve an agreement which may not amount to a transfer of an interest in the restricted lands. No substantial risk of litigation would moreover be involved in such delegation-----

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INDIANS; AUTHORIZATION FOR
EXPENDITURE OF TRIBAL
INDUSTRIAL ASSISTANCE
FUNDS.

6. The Secretary of the Interior may delegate to the Commissioner of Indian Affairs authorization for the expenditure of tribal industrial assistance funds for tribal enterprises. Such delegation has in fact already been made under the terms of the amend-

Secretary of the Interior, Authority—Continued.	Page	Secretary of the Interior, Authority—Continued.	Page
Delegation of Administrative Power; Commissioner of Indian Affairs —Continued.		Delegation of Administrative Power; Commissioner of Indian Affairs —Continued.	
ments to Part 29 of the Credit Regulations approved on July 2, 1943. The delegation may be made because the appli- cable legislation does not re- quire approval by the Secre- tary; it required only that the regulations shall be Secre- tarily prescribed _____	501	delegation, and such delega- tion could be made by the Secretary to the head of a bureau in conformity with the legislation governing the re- lationship of the Secretary to the bureau _____	501
INDIANS; AUTHORITY TO MAKE CONTRACTS PUR- SUANT TO JOHNSON- O'MALLEY ACT.		OSAGE ALLOTTEES; APPROVAL OF APPLICATIONS; ACT OF APRIL 18, 1912.	
7. The Secretary of the In- terior may delegate to the Commissioner of Indian Af- fairs authority to make con- tracts pursuant to the John- son-O'Malley Act of April 16, 1934, as amended (25 U. S. C. 452-455). The fact that the making of the contract in- volved discretionary elements does not prevent delegation, especially since the Secretary of the Interior is given wide rule-making authority under the statute _____	501	9. The Secretary may dele- gate to the Commissioner of Indian Affairs the function of approving applications under the provisions of section 5 of the act of April 18, 1912 (37 Stat. 87) _____	737
INDIAN AFFAIRS; TRAVEL ORDERS.		Settlement.	
8. The Secretary of the In- terior may delegate to the Commissioner of Indian Af- fairs the approval of authori- zations for travel which under the existing orders of the Sec- retary require his approval. The reason for this conclusion is the same as that stated in Solicitor's memorandum M. 33180 of June 14, 1943, which held that such a delegation could be made because the Standardized Government Travel Regulations permitted		1. By virtue of the Taylor Grazing Act of 1934, rights of settlement may no longer be initiated _____	557
		2. The settlement and im- provement of lands in the pub- lic domain expressly with- drawn from settlement and entry create no rights in the occupant but constitute an unlawful use, rendering the occupant liable for damages in trespass _____	707
		Sisseton Reservation, South Dakota.	
		See Indians and Indian Lands, subheading Criminal Jurisdiction of State, State Game Laws.	
		Sodium.	
		See Appeals, subheading Evidence; Mineral Leasing Act.	

Soil and Moisture Conservation Activities.

Authority of the Secretary; Federal Lands; Reclamation Projects.

1. The Secretary of the Interior has power, pursuant to section 6 of Reorganization Plan No. IV (54 Stat. 1234) and the act of April 27, 1935, as amended (49 Stat. 163, 16 U. S. C. 590a-590q), to perform soil and moisture conservation measures on federally owned or controlled lands under the jurisdiction of this Department and on any other lands, with the consent of the owners, where the primary purpose is the protection and benefit of federally owned or controlled lands under the jurisdiction of this Department. The fact that resultant benefits flow to privately owned lands is immaterial. The Secretary of the Interior is authorized to conduct preventive measures, including, but not limited to, engineering operations, methods of cultivation, the growing of vegetation and changes in the use of land. He may also perform measures designed to secure the preservation and improvement of soil fertility, the promotion of the economic use and conservation of land, the diminution of exploitation and wasteful and unscientific use of national soil resources, the prevention of floods and siltation of reservoirs and the improvement of irrigation and land drainage -----

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Soldiers' and Sailors' Civil Relief Act of 1940.

Military Service; Applicant for Homestead Entry; Appeal.

1. Applicant for homestead entry entered military service

Soldiers' and Sailors' Civil Relief Act of 1940—Continued.

Military Service; Applicant for Homestead Entry; Appeal—Con.

while an appeal was pending before the Department from the decision of the Commissioner of the General Land Office rejecting his application: *Held*, (1) where an appeal is filed and perfected by an applicant for homestead entry prior to his entrance into the military service, action on the appeal in the regular course is not stayed by notice of military service; (2) in order for administrative action to be suspended in a public land proceeding involving a person in the military service it must appear that if action is taken in the regular course the initiated or acquired rights of such a person may, by reason of the fact that he is in the military service, be prejudiced thereby; (3) where an applicant for homestead entry in the military service is entitled by departmental regulations to a rehearing but, before filing and perfecting a motion for rehearing, he requests that final action on the entry be suspended during the period of his military service, action on the rehearing will be suspended during the period of military service, unless the applicant subsequently elects to proceed with the case during his service period -----

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State Courts.

See Indians and Indian Lands, subheading Five Civilized Tribes, Condemnation; Indians and Indian Lands, subheading Partition, Restricted Land; Indians and Indian Lands, subheading Sisse-

State Courts—Continued.

ton Reservation, Criminal Jurisdiction of State.

State Exchanges.

See Taylor Grazing Act and Lands.

State Game Laws.

See Indians and Indian Lands, subheading Sisseton Reservation, Criminal Jurisdiction of State; Indians and Indian Lands, subheading Wind River Reservation, Hunting and Fishing, Ceded Land.

State Laws.

See Drainage, subheadings Arkansas, Minnesota; Rights-of-Way, subheading Electric Transmission Lines, Compliance With State Regulations; Trespass, subheading Measure of Damages and Erie Doctrine.

State Taxes.

See Contracts; Indians; Oil and Gas Leases, Indian Lands.

Statutes of the States and Territories.

See Table of Statutes cited, p. LXVII.

Statutes of the United States.

See Table of Statutes cited, p. LI.

Statutory Construction.

See, also, Hatch Political Activity Act; Mineral Leasing Act; Ramspeck Act; Taylor Grazing Act and Lands; Trespass, subheading Measure of Damages and Erie Doctrine re Rules of Decision Act.

Ambiguous Statutory Language; Retrospective Application of Construction.

1. The Department's construction of ambiguous statu-

Page Statutory Construction—Con. Page**Ambiguous Statutory Language; Retrospective Application of Construction—Continued.**

tory language which, on its face, is reasonably susceptible of a contrary interpretation will not be given retrospective application where such application would cause hardship and inequity -----

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Caraway Act of January 17, 1920 (41 Stat. 392, 43 U. S. C. 1041-1048).

2. See Drainage, subheading Arkansas.

Color of Title Act of December 22, 1928 (45 Stat. 1069, 43 U. S. C. 1068, 1068a).

3. See Color of Title.

Congressional Grants: Act of August 7, 1846 (9 Stat. 66).

4. See Public Lands, subheading Accretion and Avulsion.

Indian Children, Legitimate and Illegitimate; Inheritance Rights: Act of February 28, 1891 (26 Stat. 794, 795, 25 U. S. C. 371), Sec. 5.

5. See Indians.

Legislation re Selections in Lieu of Lands in Forest Reserves:

6. Act of June 4, 1897 (30 Stat. 36), permitting the selection ----- 283, 284, 294, 298, 305-307, 310

7. Act of June 6, 1900 (31 Stat. 614), restricting the character of the lands to be selected ----- 227-229, 233-235, 238-239, 298-301

8. Act of March 3, 1905 (33 Stat. 1264), "An Act Prohibiting the selection of timber lands in lieu of lands in forest reserves," repealing the previous acts ----- 227, 229, 232, 233, 241, 242, 288, 301-303, 306, 310

Statutory Construction—Con.

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Nationality Act of October 14, 1940 (54 Stat. 1137, 8 U. S. C. 501 et seq.).

9. See Puerto Rico, subheading Citizenship of Puerto Ricans.

Oil and Gas Leases, Cancellation: Act of February 25, 1920, as Amended August 21, 1935 (49 Stat. 674, 678, 30 U. S. C. 226), Sec. 17.

10. See Oil and Gas Lands.

Oil and Gas Leases, Extension: Act of July 29, 1942 (56 Stat. 726, 30 U. S. C. 226b), as Amended December 22, 1943 (57 Stat. 608, 30 U. S. C. 226b), and September 27, 1944 (58 Stat. 755).

11. See Oil and Gas Lands.

Oil and Gas Leases on Conveyed Park Lands: Act of June 6, 1942 (56 Stat. 326).

12. See United States, subheading Grant By (Waterloo Recreational Demonstration Area, Michigan).

Oklahoma Indian Welfare Act of June 26, 1936 (49 Stat. 1967, 25 U. S. C. 501).

13. See Indians and Indian Lands, subheading Five Civilized Tribes, Condemnation, Restricted Lands.

Puyallup Tribal Funds; Disposition of Individualized Funds Credited to Estates of Deceased Enrollees: Act of December 5, 1942 (56 Stat. 1040).

14. See Indian Tribes, subheading Puyallup Tribe.

Railroad Land Grants: Transportation Act of September 18, 1940 (54 Stat. 954, 49 U. S. C. 65), Section 321(b); Acts of June 22, 1874 (18 Stat. 194, 43 U. S. C. 888); April 28, 1904 (33 Stat. 556).

15. See Railroad Land Grants.

Statutory Construction—Con.

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Relief Statute: Act of December 24, 1942 (56 Stat. 1080).

16. See Oil and Gas Lands, subheading Discovery of New Oil Field.

Retrospective Effect of Statute: Act of December 24, 1942 (56 Stat. 1080).

17. See Oil and Gas Lands, subheading Discovery of New Oil Field.

Retrospective Operation of Statute.

18. In the absence of an unequivocal expression of the legislative intent that a statute shall operate retrospectively its operation is prospective only -----

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Right-of-Way Across National Park Lands: Acts of January 21, 1895 (28 Stat. 635, 43 U. S. C. 956); February 26, 1919 (40 Stat. 1175, 16 U. S. C. 221), Sec. 5.

19. See Rights-of-Way, subheading Aerial Tramway, Grand Canyon National Park.

Rights-of-Way, Ditches and Canals; Pipe Lines, Water for Domestic Use: Act of August 30, 1890 (26 Stat. 391, 43 U. S. C. 945).

20. See Rights-of-Way.

Rights-of-Way Over Allotted Indian Lands: Act of March 11, 1904 (33 Stat. 65), as Amended March 2, 1917 (39 Stat. 973, 25 U. S. C. 321).

21. See Indians and Indian Lands, subheading Rights-of-Way, Telephone and Telegraph Lines, Pipe-Line Companies.

Soil Conservation and Domestic Allotment Act of April 27, 1935 (49 Stat. 163, 16 U. S. C. 590a et seq.).

22. See Indians and Indian Lands, subheading Allotted Lands.

Statutory Construction—Con.

State Taxes Imposed on Royalty from Oil and Gas Leases; Liability of Indian Tribes: Act of February 28, 1891 (26 Stat. 795), Sec. 3, as Amended May 29, 1924 (43 Stat. 244, 25 U. S. C. 398).

23. See Oil and Gas Leases, Indian Lands.

Strategic War Materials Act of June 7, 1939 (53 Stat. 811, 50 U. S. C. 98 et seq.).

24. See Strategic Minerals and Metals, subheading Recommendations to Congress by Secretary of the Interior.

Surplus Property Act of October 3, 1944 (58 Stat. 765).

25. See Strategic Minerals and Metals, subheading Recommendations to Congress by Secretary of the Interior.

Transportation Act of September 18, 1940 (54 Stat. 954, 49 U. S. C. 65), Section 321(b).

26. See Railroad Land Grants.

Unlawful Inclosures Act of February 25, 1885 (23 Stat. 321, 43 U. S. C. 1062).

27. See Color of Title.

Volstead Act of May 20, 1908 (35 Stat. 169).

28. See Drainage, subheading Minnesota.

Stock-Raising Homestead.

See Homestead, subheading Stock Raising.

Strategic Minerals and Metals.

See, also, Bureau of Mines, subheading Exploration Agreements; Contracts, subheading Drilling in Alaska.

Recommendations to Congress by Secretary of the Interior.

1. The Surplus Property Act of 1944 (58 Stat. 765), requires the Secretary of the

Page	Strategic Minerals and Metals	Page
	—Continued.	

Recommendations to Congress by Secretary of the Interior—Con.

Interior to participate jointly with the Secretary of War and the Secretary of the Navy in making recommendations to Congress, through the agency of the Army and Navy Munitions Board, respecting the maximum and minimum amounts of each strategic mineral or metal which should be held in the stock pile authorized by the Strategic War Materials Act (act of June 7, 1939, 53 Stat. 811, 50 U. S. C. 98 et seq.) -----

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Submerged Lands.

See Public Lands, subheading Accretion and Avulsion.

Survey.

See Public Lands, subheading Accretion and Avulsion; Railroad Land Grants.

Swift v. Tyson, 16 Pet. 1 (1842) Overruled.

See Trespass, subheading Measure of Damages and Erie Doctrine.

Taxes, Federal and State.

See Contracts, subheading State Sales and Use Taxes; Indians, subheading State Sales Taxes, Purchases On and Off Reservations; Oil and Gas Leases, Indian Lands, subheading State Taxes Imposed on Royalty, Liability of Indian Tribes; Virgin Islands, subheading Government Liability for Taxes on Income from Properties.

Taylor Grazing Act and Lands.

See, also, Color of Title; Forest Lieu Selections; Forest

Taylor Grazing Act and Lands
—Continued.

Lieu Selection Statutes; Grazing and Grazing Lands; Indians and Indian Lands; Railroad Land Grants, subheading Transportation Act of 1940, Central Pacific Railway; Settlement.

Applicability of Section 7.

1. See Drainage, subheadings Arkansas, Minnesota.

Secretary's Authority and Duty re Classification of Lands.

2. See Forest Lieu Selections ----- 277-279, 296-298

Settlement.

3. By virtue of the Taylor Grazing Act of 1934, rights of settlement may no longer be initiated -----

State Exchanges; School Land Grants; Railroad Right-of-Way; Mineral Reservations.

4. In connection with an application for exchange under section 8 of the act of June 28, 1934 (48 Stat. 1269), the State of Wyoming tendered a quitclaim deed to a portion of school Sec. 36, subject to the right-of-way of the Union Pacific Railroad Company over the land and to a reservation to itself, its successors and assigns, of all minerals and mineral rights in the premises described in the deed with the right to prospect for, mine and remove the same. The State acquired the land either under its grant in the enabling act of July 10, 1890 (26 Stat. 222), if not known to be mineral at the date of said act, or under the act of January 25, 1927 (44 Stat. 1026), if known to be mineral at the first-mentioned date. The right-of-way was

Taylor Grazing Act and Lands Page
—Continued.

State Exchanges; School Land Grants; Railroad Right-of-Way; Mineral Reservations—Continued.

granted in 1869 under the land grant to the Northern Pacific Railroad Company of July 1, 1862 (12 Stat. 489). The State in its application disclaimed any interest in any minerals that might be in the right-of-way. Nevertheless, the Commissioner of the General Land Office as a condition to the acceptance of the deed required the State to file a quitclaim deed to the minerals within the right-of-way.

Held, (1) that the State took title under its grant subject to the right-of-way; (2) that the estate of the railroad was a limited fee on the implied condition of reverter in the event the company ceases to use or retain the land for the purposes for which it was granted; (3) that if the State acquired the land under the act of July 10, 1890, its deed of the land conveyed no right, title or interest in the right-of-way, but, if on the other hand the State acquired the land under the act of January 25, 1927, certain provisions of subsection (c) thereof as amended by the act of May 2, 1932 (47 Stat. 140), might mean that the grant would take effect upon the railroad right-of-way extinguished by forfeiture or abandonment were it not for the provisions of the act of March 8, 1922 (42 Stat. 414); (4) that so far as the question as to whom the land is to go upon extinguishment of the right-of-way is

Taylor Grazing Act and Lands —Continued.

State Exchanges; School Land Grants; Railroad Right-of-Way; Mineral Reservations—Continued.

concerned, the act of 1927 is general, whereas the act of 1922 is special relating only to the extinguishment of rights-of-way; that the act of 1927 does not purport to repeal the act of 1922 and there is no inconsistency between the two acts and, therefore, the act of 1927 will not be construed as repealing the act of 1922; (5) that as the act of 1922 provides for the vesting of title in the land in the right-of-way to the person, etc. who holds the title to the land crossed by the right-of-way at the time of its extinguishment with reservation of mineral to the United States, the State would acquire no interest in the right-of-way under the act of 1927; that what interest it would acquire would be only under the act of 1922; but since the State by its deed to the United States divests itself of the land crossed by the right-of-way, the State could not acquire any interest therein under the act of 1922; (6) that the State has no present interest in the right-of-way and after the proffered deed is accepted it will not be able to acquire any interest therein under the act of 1922 in the future; (7) that as the deed conveys the land subject to the right-of-way and as the disposition of the land and minerals therein upon extinguishment of the right-of-way is governed by the act of March 8, 1922, it is not so ambiguous in form as to cast any cloud on the title

Page

Taylor Grazing Act and Lands —Continued.

State Exchanges; School Land Grants; Railroad Right-of-Way; Mineral Reservations—Continued.

of the United States as to any minerals in the right-of-way, and a deed quitclaiming such minerals will not be required

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Unrestricted Use of Federal Range Terminated.

5. See Color of Title.

Tennessee, State of.

See Public Lands, subheading Accretion and Avulsion.

Territories.

See Name of Territory Concerned.

Timber.

See Damage Claims; Oregon and California Railroad Grant Lands, subheading Sale Without Competitive Bidding; President's Authority, subheading Olympic National Park, Utilization of Timber for War Purposes.

Timber Lands.

When Unsuitable for Homestead Entry.

1. See Forest Lieu Selections.

Timber Exploitation and Frauds.

Abuse of Forest Lieu Selections by Speculators.

1. Curbs sought by amendment of June 6, 1900, and repeal of March 3, 1905—227, 232-233, 274, 299-302

Title.

See, also, Drainage, subheadings Arkansas, Minnesota; Forest Lieu Selections; Indians and Indian Lands, sub-

Title—Continued.

heading Navajo Tribe, Title to Tribal Lands; National Park Service, subheadings County Roads, Natchez Trace Parkway; Public Lands, subheading Accretion and Avulsion; Railroad Land Grants; Res Judicata; Taylor Grazing Act and Lands, subheading State Exchanges; United States, subheading Grant By; Virgin Islands.

Innocent Purchasers; Notice of Defects in Title.

1. Purchasers of land are charged with notice of all defects in title indicated by the recitals in the deeds in the chain of title -----

Page Trespass—Continued.

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Transmission Lines.

See Indians and Indian Lands, subheading Rights-of-Way; Rights-of-Way, subheading Electric Transmission Lines.

Trap Sites.

See Alaska, subheading Fish Trap Sites.

Travel Orders.

See Secretary of the Interior, Authority, subheading Delegation.

Treaties and Agreements.

See p. LXIX.

Trespass.

See, also, National Parks and Monuments, subheading Domestic Animals Trespassing; Rights-of-Way, subheading Ditches, Canals or Reservoirs.

Damages, by What Rules Controlled.

1. Damages for unlawful uses of Government lands are

controlled by the law of trespass and its rules for the measure of damages, not by provisions of statutes or of regulations fixing charges for corresponding lawful uses --

Damages; Unlawful Use and Occupancy of Withdrawn Lands.

2. The settlement and improvement of lands in the public domain expressly withdrawn from settlement and entry create no rights in the occupant but constitute an unlawful use, rendering the occupant liable for damages in trespass: *Held*, one who occupies lands within a stock-driveway withdrawal and constructs thereon dwellings, barns, pens, corrals, shops, filling stations and buildings for other commercial enterprises is not a settler, possessed of the settlement rights recognized by the courts, but a trespasser who must respond in damages for his unlawful use of another's land -----

Damages Measured by the Worth of the Tortious Use.

3. When a trespasser not only injures an owner by depriving him of his chosen use of his property or of his privilege of withholding it from use but also tortiously uses that property for his own purposes and gain, the damages for which he is responsible are determinable not by reference to the value of what the owner might have done with his property but by reference to the value of what the tortfeasor actually did with it: *Held*, that one who without authority uses lands in a stock driveway for his own purposes, building thereon structures for

Trespass—Continued.

Damages Measured by the Worth of the Tortious Use—Continued.

diverse uses and conducting thereon diverse commercial enterprises is liable not for the worth of some different use, such as grazing, which the Government might have made of the lands but for the worth of the use which he makes of the land, namely, the reasonable rental value of that use, its extent and duration both being considered _____

Measure of damages and doctrine of *Erie Railroad Co. v. Tompkins* re law governing in the absence of Federal legislation.

GENERAL LAND OFFICE PRACTICE; INSTRUCTIONS TO TRESPASS AGENTS; MASON V. UNITED STATES; STATE STATUTORY LAW; SWIFT V. TYSON; RULES OF DECISION ACT; FEDERAL COMMON LAW; EFFECT OF *ERIE* DOCTRINE ON INSTRUCTIONS.

4. In the absence of Federal legislation fixing the measure of damages for trespass and conversion affecting United States property, the General Land Office instructs its trespass agents that under *Mason v. United States*, 260 U. S. 545 (1923), State law, meaning statutory law, relating to trespass damages is binding on Federal courts. It also instructs them that in the absence of State statutes the rules of Federal common law govern, namely, the interpretations of the common law made by the Federal courts, thus implicitly recognizing the doctrine of *Swift v. Tyson*, 16 Pet. 1 (1842). Question therefore arises whether the decision in *Erie Railroad Co. v. Tompkins*,

Page Trespass—Continued.

Measure of damages and doctrine of *Erie Railroad Co. v. Tompkins* re law governing in the absence of Federal legislation—Continued.

304 U. S. 64 (1938), requires these instructions to be changed so as to state that in the absence of Federal legislation only State law governs, written or unwritten _____

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DOCTRINE OF *SWIFT V. TYSON* STATED AND OVERRULED BY *ERIE RAILROAD CO. V. TOMPKINS*; RULES OF DECISION ACT REINTERPRETED.

5. The *Erie* case describes the doctrine of *Swift v. Tyson* as holding that under the Rules of Decision Act, 28 U. S. C. 725, Federal courts exercising jurisdiction on the ground of diversity of citizenship in trials at common law need not, in matters of general jurisprudence, apply the unwritten law of the State as declared by its highest court but are free to exercise an independent judgment as to what the common law of the State is. The opinion then declares that this holding misconstrued the Rules of Decision Act and that except in matters governed by the Federal Constitution or by acts of Congress the rules of decision are those of State law, written or unwritten, and that there is no Federal general common law _____

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SCOPE OF *ERIE* DOCTRINE UNCERTAIN; NOT YET APPLIED IN SUBJECT-MATTER JURISDICTION; TREND TOWARD EXTENSION OF THE FEDERAL FIELD IN ABSENCE OF FEDERAL LEGISLATION.

6. Limitation of the *Erie* doctrine to diversity cases is

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Trespass—Continued.

Measure of damages and doctrine of
Erie Railroad Co. v. Tompkins re
law governing in the absence of
Federal legislation—Continued.

suggested by the peculiar relation to all its factors to the diversity jurisdiction; by its nonextension thus far to cases in the subject-matter jurisdiction; by observations in subsequent opinions; and by decisions in which questions affecting the United States as a party have been decided as Federal although they have not been expressly answered by Federal Constitution, treaties or statutes -----

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THE ERIE DOCTRINE AND
FEDERAL COMMON LAW.

7. The Erie declaration by Mr. Justice Brandeis "There is no federal general common law" has been termed too broad. Since its pronouncement both qualified writers and Federal judges, among them Mr. Justice Brandeis himself, have recognized a Federal common law, a body of decisional law developed by the federal courts, untrammelled by State court decisions. Mr. Justice Jackson, concurring in *D'Oench, Duhme & Co. v. Federal Deposit Insurance Corp.*, 315 U. S. 447, interprets the Erie declaration and finds that Federal common law does exist -----

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DEPARTMENT OF JUSTICE AND
TRESPASS; ITS ARGUMENT
THAT MEASURE OF DAMAGES
IS A MATTER OF FEDERAL
LAW DESPITE ABSENCE OF
FEDERAL LEGISLATION;
REASONS.

8. In its petition for certiorari in *Standard Oil Co. of*

Page Trespass—Continued.

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Measure of damages and doctrine of
Erie Railroad Co. v. Tompkins re
law governing in the absence of
Federal legislation—Continued.

California v. United States, 309 U. S. 654 (1940), the Department of Justice, relying on *Board of Commissioners v. United States*, 308 U. S. 343, 350, argued that Federal law controls when the right to be enforced springs from the holding of property by the Government in a sovereign capacity under the Constitution and that the measure of damages in a conversion of United States oil is not to be determined by State law under *Mason v. United States* and *Erie v. Tompkins* but is primarily a matter of Federal law as to which a Federal court may formulate a judicial rule in the absence of express Federal legislation -----

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9. The Supreme Court not having stated its grounds for denial of certiorari in this case, the Government's argument is not foreclosed. Further, it appears reinforced by subsequent decisions expanding the definition of Federal questions. For the Congress has occupied the field of public lands under the Constitution and, in statutes of various types, has recognized a duty to protect the public property in its care and to enforce the public's rights against trespass, whether civil or criminal. The whole question of trespass and enforcement of Federal rights against it may therefore be considered primarily a matter deriving from Federal sources, both policy and law, even in the absence of an express statute, and as such a Federal ques-

Trespass—Continued.

Measure of damages and doctrine of
Erie Railroad Co. v. Tompkins re
 law governing in the absence of
 Federal legislation—Continued.

tion would be subject to Fed-
 eral decisional law rather than
 to the rules of the State,
 whether written or unwritten

REQUIREMENTS IF MEASURE
 OF TRESPASS DAMAGES
 PROVE TO BE A FEDERAL
 QUESTION.

10. Decision that measure
 of damages for trespass on
 Federal property is a Federal
 question would make both the
Mason and the *Erie* case in-
 applicable to trespass cases and
 would require the instructions
 to state that in the absence of
 express Federal legislation
 only Federal decisional rules
 of damage control -----

THE SEVERAL CONSIDERATIONS
 ADVANCED ARE PERSUASIVE
 OF *ERIE'S* INAPPLICABILITY
 HERE BUT DO NOT PRESENT
 ANY COMPELLING LEGAL
 REASON FOR REVISION OF
 INSTRUCTIONS TO TRESPASS
 AGENTS.

11. The foregoing considera-
 tions are persuasive both that
 the *Erie* decision is inapplica-
 ble here and that trespass on
 Federal property is a Federal
 question controlled by Federal
 decisional law under the excep-
 tion to the Rules of Decision
 Act. At present however there
 is no compelling legal reason
 for revision of the instructions
 to accord with these assump-
 tions -----

Trust Funds.

See Indians and Indian
 Lands, subheading Osage
 Tribe, Headrights.

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United States.

Page

See, also, Indians and In-
 dian Lands; Mineral Leasing
 Act; Taylor Grazing Act and
 Lands; Virgin Islands.

Grant by; Title to Mineral Rights;
 Oil and Gas Leases on Conveyed
 Park Lands; Act of June 6,
 1942; Effect of Condition Subse-
 quent.

1. Title to the minerals un-
 derlying lands within the
 Waterloo Recreational Demon-
 stration Area was conveyed to
 the State of Michigan by the
 United States subject to the
 conditions and provisions con-
 tained in the act of June 6,
 1942 (56 Stat. 326), and in the
 deed. The United States holds
 a possible power of termina-
 tion, which upon breach of the
 conditions contained in the
 deed becomes a vested power
 of termination. The Depart-
 ment should exercise diligence
 by notifying the Secretary of
 any real or substantial viola-
 tion of the conditions by the
 State of Michigan in order to
 protect the interests of the
 United States -----

Lands Acquired in Trust for In-
 dians; Effect of Zoning Ord-
 nances.

2. Zoning is a proper exer-
 cise of the police power of a
 municipality, county or State.
 The courts have uniformly
 held that the United States
 may perform its functions
 without conforming to State,
 county or municipal police
 regulations -----

3. Land acquired by the
 United States in trust for
 Indians is, in effect, land of
 the United States. Zoning
 ordinances do not affect such
 lands -----

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United States Code.

See Table of Statutes cited,
p. LXIV.

Unlawful Inclosures Act.

See Color of Title; Noncompliance With Act.

Unliquidated Damages.

See Contracts.

Virgin Islands.

Virgin Islands Company; Government Liability for Taxes on Income from Properties; Section 306, Lanham Act.

1. The Government of the United States, through the Federal Works Administrator, has acquired, under the Lanham Act, fee title to the power plant and transmission lines and a leasehold interest in the docks and appurtenant facilities at Charlotte Amalie, St. Thomas, Virgin Islands. These properties are operated, maintained and managed by The Virgin Islands Company as agent for the Federal Works Administrator. Under section 5 of the act of May 26, 1936 (49 Stat. 1372, 48 U. S. C. 1401(d)), The Virgin Islands Company is required to pay into the municipal treasuries of the Virgin Islands amounts equal to the amounts of any taxes of general application which a private corporation similarly situated would be required to pay. The act further requires the payment of taxes on any property owned by the United States in the Virgin Islands which is used for ordinary business or commercial purposes. The income derived from any property so used is to be made available for making such payments. This obli-

Page **Virgin Islands—Continued.** Page

Virgin Islands Company; Government Liability for Taxes on Income from Properties; Section 306, Lanham Act—Continued.

gation is not inconsistent with section 306 of the Lanham Act which relates only to payments in lieu of real property taxes__ 348

Volstead Act of May 20, 1908.

See Drainage, subheadings Arkansas, Minnesota.

War Department.

See Mineral Leasing Act, subheading Public Lands Acquired for Specific Purpose.

War Powers Acts.

See Contracts, subheading Liquidated Damages, Remission Under First War Powers Act of 1941; Forest Lieu Selections.

War Powers of the President.

See President's Authority.

Waterloo Recreational Demonstration Area, Michigan.

See United States; subheading Grant By.

Wheeler-Howard Act.

See act of June 18, 1934 (48 Stat. 984).

Wind River Reservation, Wyoming.

See Indians and Indian Lands, subheading Hunting and Fishing.

Withdrawal of Public Lands.

See, also, Coal Lands; Drainage, subheadings Arkansas and Minnesota re Executive order of February 5, 1935, and departmental orders of September 19 and November 2, 1934; Isolated Tracts; Res-

Withdrawal of Public Lands—Continued.

tations from Withdrawals; Trespass, subheading Unlawful Use and Occupancy of Withdrawn Lands.

Existing Valid Rights; Mining Location; Homestead Application.

1. Homestead application for land in prior mining location not returned as mineral filed before withdrawal of November 26, 1934, but pending extinguishment of mining claims held valid as of date of filing upon complete extinguishment of locators' claims -----

475

General Withdrawals of 1934 and 1935.

2. Implement comprehensive policy of conservation and development of natural resources ----- 228, 233, 234, 239, 240, 272, 277-279, 296-302

Reclamation Withdrawal; Mining Locations on Withdrawn Lands.

3. First form withdrawals of public land under the act of June 17, 1902, for reclamation purposes preclude location under the mining laws and withdrawals under the subsequent act of June 25, 1910, as amended August 24, 1912, permit only location of claims valuable for metalliferous minerals. Pumice is a non-metalliferous mineral and land withdrawn under either of the acts noted above is not subject to location of claims valuable for pumice -----

671

Words and Phrases.

1. "Abolished agency," as used in Executive Order No. 6166, section 21, means any agency which is abolished, transferred, or consolidated --

19

Words and Phrases—Continued. Page

2. "Accrued" and "accruing," within the meaning of section 4 of the act of March 2, 1929 (45 Stat. 1478). See "Income from Osage Headrights" -----

378

3. "Actual Residence" under the homestead laws means personal presence and physical occupation of the premises as a home -----

410

4. A bill of attainder is a legislative act which inflicts punishment without a judicial trial -----

225

5. The term "canals" as used in the act of August 30, 1890 (26 Stat. 391, 43 U. S. C. 945), includes pipe lines used to transport water -----

490

6. "Delegation" is a matter of degree -----

507

7. By "discovery" is meant not mere indications, but a quantity of mineral sufficient to warrant a prudent man in making expenditures towards that end -----

571

8. "Exclusive" or "several" right of fishery, as used in section 1 of the act of June 6, 1924 (43 Stat. 464), as amended. See "Fish Trap Sites in Alaska" -----

4, 5

9. The "general supervisory authority" derived from the acts of July 9, 1832, as amended; June 30, 1834, and February 14, 1903, is simply a power to take administrative measures necessary for the execution of responsibilities and authorities otherwise more definitely fixed by statute or treaty -----

107, 311

10. For definition of the word "headright" see "Income from Osage Headrights" -----

385, 387

11. The word "heirs" has been given various definitions,

Words and Phrases—Continued.	Page
depending on the circumstances surrounding its use. In a broad or loose sense it may refer to the persons succeeding to the property of a decedent, either by inheritance or by purchase under a will. It also has a technical meaning, in which it refers to those persons on whom the laws of succession cast the property of an intestate _____	683
12. An Indian reservation is simply a part of the public domain set apart by proper authority for use and occupation by a group of Indians_____	343
13. "A conception of the mind is not an invention until represented in some physical form * * *"_____	376, 730
14. An invention is not considered as "made," as defined by Departmental Order No. 1763, November 17, 1942, until there has been some demonstrable overt action on the part of the inventor establishing the fact of the invention, such as disclosure either orally or in writing, or the preparation of working drawings or a model _____	730
15. "Land dependent by use" is defined as "forage land which is of such character that the conduct of an economic livestock operation requires the use of the Federal range in connection with it." (See section 2, paragraph (g), Federal Range Code of 1942.) _____	686
16. The requirements of section 17 of the act of February 25, 1920, as amended August 21, 1935, which prescribe a 30-day notice of intent to cancel an oil and gas lease to the "lease owner," are met by service of such notice upon the record titleholder of the lease _____	661

Words and Phrases—Continued.	Page
17. The word "maintain" has been construed to mean: "Keep in repair and replace" _____	84
18. The term "parallel lands," as applied to certain privately controlled lands in grazing districts, must be considered as embracing those lands that are generally of the same character and type as the surrounding Federal range; that is, they are uncultivated and produce the same general types of forage and are physically similar to the surrounding Federal range _____	686
19. "Power of termination" as used in Restatement, Property (1936), sec. 24, Special Note _____	660
20. An employee is engaged in "research or investigation," as used in Departmental Order No. 1763 of November 17, 1942, if his duties include the study of principles of a subject with a view to increasing the field of knowledge or of discovering practical applications of the principles; or if he is assigned to the solution of a practical problem where known solutions are unsatisfactory in such circumstances that good craftsmanship or professional competence would require him to engage in research or investigation in an attempt to reach an adequate solution_____	738
21. "Resident Entryman" means a homestead entryman who is actually residing on the land in his homestead entry ____	409
22. "Resident Farm Owner" means a farm owner who is actually residing on the farm he owns _____	409
23. In oil and gas leases, the word "royalty" is used to denote the interest or share of _____	

Words and Phrases—Continued.

the lessor in oil and gas production _____

24. In its broadest sense a "sale" comprehends any transfer of property from one person to another for a valuable consideration _____

25. The vesting of a power in the "Secretary" rather than the "Department" of the Interior is usually not significant since these terms are as a rule used interchangeably in legislation and legislative debate _____

26. Section 101(a) of the Nationality Act of 1940 defines the term "national" as meaning "a person owing permanent allegiance to a state" _____

27. Section 101 (c) of the Nationality Act of 1940 defines

Page

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Words and Phrases—Continued.

Page

the term "naturalization" as meaning "the conferring of nationality of a state upon a person *after birth*" _____

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Wyoming, State of.

See Taylor Grazing Act and Lands, subheading State Exchanges.

Yuma Indians.

See Damage Claims, subheading Property Damage, Flooding.

Zoning Ordinances.

See United States, subheading Lands Acquired in Trust for Indians.